Supreme Court, U.S.
FILED

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No. 03- ____

In the Supreme Court of the United States

MATTHEW FOUBERT, Officer,
Petitioner,

v.

CHERYL D. LYONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent brought this excessive force claim against Petitioner who had used a tackling technique to arrest Respondent. The record contains undisputed facts that support the officer's belief that Respondent posed a risk of harm to a fellow officer, and that he was justified in using force that caused no serious injury to Respondent.

Based on the facts as alleged by Respondent, the Sixth Circuit in a fractured decision held Petitioner used excessive force. The court found that no reasonable officer could have inferred a risk of harm that would justify the exercise of force. Next, the Sixth Circuit denied Petitioner qualified immunity, asserting that the law surrounding the officer's use of force was clearly established while relying upon factually distinguishable and post-incident case law.

THE QUESTIONS PRESENTED ARE THESE:

1. When some undisputed facts in the record support an officer's inference that a suspect posed a risk of harm to a fellow officer, does the qualified immunity doctrine of *Saucier v. Katz*, 533 U.S. 194 (2001) permit a court to deny qualified immunity: (a) based not on the totality of the circumstances known to the officer but, instead, solely on the visible circumstances at the time he used force; (b) based on cases whose fact patterns under *Saucier* are "distinguishable in a fair way" from this case; and (c) based on case law decided after the incident at issue?

2. Should this Court, in a case alleging the use of constitutionally excessive force, create an

exception to or limit the precedential effect of the "constitutional-question-first" rule, recently addressed in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), when such rule operates to create "clearly established" law and the declared law in turn operates under *Saucier* to generally overcome the qualified immunity of police officers making similar split-second decisions?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner, Matthew Foubert, is a police officer for the City of Xenia, Ohio, who was denied qualified immunity in a Section 1983 action alleged the use of force in violation of the Fourth Amendment.

Respondent

Respondent is Cheryl D. Lyons, plaintiff in the underlying Section 1983 case.

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PETITION FOR A WRIT OF CERTIORARI

Matthew Foubert petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (*App.*, *infra*, 1a-39a) and the opinion of the district court (*App.*, *infra*, 40a-72a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2004. On March 31, 2004, Justice Stevens granted an extension of the time within which to file a petition for a writ of certiorari up to and including May 26, 2004. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983.

INTRODUCTION

This case arises out of the actions taken by Officer Foubert on August 18, 1998, to rush to the aid of his partner, Officer Keith, when she requested emergency back-up assistance. Officer Keith, while investigating a violent juvenile assault offense, found herself out powered by the juvenile's recalcitrant mother, Lyons, who admits to resisting arrest, threatened Officer Keith's safety in a location outside the public view. Officer Foubert, knowing his partner to be in distress after personally hearing her radio for help, provided assistance by using non-gratuitous force to take physical control of Lyons to effectuate her handcuffing.

Lyons sustained no serious physical injury as a result of the force used by Officer Foubert.

The Sixth Circuit Court of Appeals denied Officer Foubert qualified immunity on Lyon's excessive force claim arising out of the tackle technique Officer Foubert used to handcuff Lyons. The majority failed to consider the totality of the circumstances known to Officer Foubert when it denied him qualified immunity and it exacerbates a developing circuit conflict on the qualified immunity analysis for excessive force claims. This case opens the door for courts to second guess the split second decisions made by police officers by unnaturally limiting the facts known by the officer, and all reasonable inferences drawn upon such facts, and to wrongly expose police officers to individual liability.

The fractured appellate court decision also manifests a widespread confusion concerning how to determine whether the law is "clearly established" for purposes of qualified immunity in Fourth Amendment excessive force cases. The alleged force does not amount to an "obvious" constitutional violation "even *in the total absence of case law.*" *See Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002)(emphasis in the original). In the wake of *Saucier v. Katz*, 533 U.S. 194 (2001), and *Hope v. Pelzer*, 236 U.S. 730 (2002), uncertainty remains because the Sixth Circuit majority here ruled the law clearly established regarding the tackle technique in a complete absence of factually similar pre-existing case law and in the presence of conflicting legal authority. The ambiguity of the state of the law is magnified by the fractured nature of the Sixth Circuit's decision. This widespread confusion regarding how clearly established law is determined must be addressed by this Court to relieve police officers, like Officer Foubert, from being exposed to

individual liability when the appellate panel is unable to agree on the state of the pre-incident law.

The fractured appellate court decision also presents this Court with a ripe case and controversy in which to address whether the "constitutional-question-first" procedure, recently mentioned in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), in which the mandatory first step of the qualified immunity analysis acts to create clearly established law. Reconsideration and limitation of the mandatory nature of this rule is appropriate, especially as it applies to the "clearly established law" question in the qualified immunity context, where individual police officers are seeking immunity in highly fact sensitive excessive force cases.

STATEMENT OF THE CASE

1. On the evening of August 18, 1998, between 9:00 and 10:00 p.m., City of Xenia police officer, Christine Keith, was in the home of minor Aiesha Ward to investigate the assault of a teenage girl. *Lyons v. City of Xenia*, 90 Fed.Appx. 835, 837 (6th Cir. 2004) *App. 2a*. Officer Keith followed Aiesha Ward into her home to collect information necessary to issue the juvenile a citation into court, because Aiesha Ward and another girl were alleged to have assaulted another female minor earlier that day. *App. 3a*. Officer Keith's purpose for obtaining consent to enter Lyons' house was to the obtain information needed to issue a citation to the daughter for assault. Aeisha's mother, Cheryl Lyons, was surprised to see Officer Keith in her home. *Id.*

In the course of her investigation, Lyons refused to provide information Officer Keith needed to issue a citation to her daughter. *Id.* The two became engaged in a verbal confrontation that escalated to screaming. *Id.* Lyons admits

to having used profanity and to making physical gestures towards Officer Keith's face while they were in very close proximity to one another. *App. 4a.* Lyons also made an out of hand comment to Officer Keith about the lawfulness of striking police officers. *Id.*

Officer Keith, by Lyons' own estimation, was three or four inches shorter and weighed at least 50 pounds less than Lyons. *Id.* In response to the physical gestures Lyons made towards her, in her capacity as a police officer, Officer Keith grabbed Lyons' wrist in an effort to arrest her. *Id.* Lyons admits she resisted and snapped her arm out of Officer Keith's grasp. *Id.* Because what had been a routine investigation had escalated, and because Officer Keith perceived a threat of physical harm to herself, she called for back-up assistance. *Id.* Petitioner, Xenia police officer Matthew Foubert, was dispatched to provide assistance. *Id.*

2. Officer Foubert, while enroute to the dispatched location, heard Officer Keith's voice as she called for help directly over the police radio. *Id.* Officer Keith had been Foubert's partner for more than two years. *App. 15a.* Officer Foubert testified that his partner's voice sounded very distressed over the radio transmission, and he believed it was an emergency call.[1] In addition to the distressed call for help from his partner, Officer Foubert could hear "commotion" in the background of the radio transmission. *Id.* Lyons admitted that, during this time, she had been in a loud verbal

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[1] The high degree of distress conveyed by that call for help was further supported by Lyons' own testimony, in which she alleged there were 3 to 5 cars outside when she was escorted to the patrol car after her eventual arrest, and she commented, "Why didn't you just call the SWAT Team?" (R. 28, Lyons Deposition, p. 193; J.A. 476).

confrontation with Officer Keith. Additionally, Lyons' daughter, the assault suspect, acknowledged she was constantly yelling at Officer Keith from another room in the house at this time. *Id.*

In sum, on this late evening when Officer Foubert responded to his partner's call for emergency help, Officer Foubert's knowledge consisted of the fact that his partner was alone inside the home of a suspect involved in a violent assault; that his partner was outside the public view and was calling for immediate help; and that his partner made a call for back-up in which she sounded very distressed. These facts are not disputed. Officer Foubert did not know how many people or suspects were involved. He did not know if any suspect was armed. He did not know what degree of danger his partner faced or what he was about to confront.

3. When Officer Foubert arrived at Lyons' house, he parked his police cruiser and ran up to the house. *App. 5a.* Pausing only to open the screen door, he ran inside. *Id.* No one disputes that, at the time Officer Foubert ran into the house, Lyons and Officer Keith were in very close proximity to each other. *Id.* As correctly noted by the appellate court, the scene Officer Foubert testified he came upon as he ran into the house is vastly different from what the respondent alleged. *Id.* Officer Foubert said, as he ran through the door, he saw Lyons and Officer Keith rolling on the floor. *Id.* Keith had secured one handcuff on Lyons and she kept telling Lyons to stop resisting. *Id.* Officer Foubert said he ran over to Officer Keith and Lyons, pulled them apart, and used a tackling technique involving weight displacement that prevents a suspect from causing harm while minimizing any injury to the suspect. In effect, Officer Foubert positioned Lyons over a nearby chair to get her in such a position that he could finish the handcuffing Keith was unable to finish. *Id.*

While the court of appeals relied upon these facts, Officer Foubert's motion seeking qualified immunity specifically set forth the following version of the events alleged by Lyons. According to Lyons, when Officer Foubert "[came] charging in [her] house like a football player," she and Officer Keith were standing close together and arguing. *App. 15a.* In the mere seconds between the time Officer Foubert ran through the door until any contact is alleged, Lyons alleged no facts that would have dispelled Officer Foubert's belief that his partner was in danger.

Lyons alleged Officer Foubert ran at her, without stopping, came into contact with her body at her midsection, and "tackled" her. Lyons' left knee met the carpeted floor in the dining room where she was standing. *App. 5a.* With Officer Foubert on top of her, Lyons felt as if she could not breath for approximately 2 or 3 seconds. *Id.* Officer Foubert then "threw" Lyons onto her right side. *Id.* According to Lyons' version of the facts, Foubert asked Officer Keith for her handcuffs, which he then used to handcuff Lyons' wrists behind her back. *Id.* While Lyons alleged the handcuffs were made as tight as they could be, she admitted she never told the officers that the handcuffs were too tight and sustained no viable injury. *App. 13a.* For this reason, the court of appeals decided qualified immunity for the handcuffing was appropriate. *Id.* Lyons got up from the floor and claims she was forcefully told by Officer Foubert to "get out of here," and that he ordered Officer Keith to take her downtown and

charge her with assault, resisting arrest, and obstructing official business.[2] (Lyons Deposition, pp. 192-193).

4. The only injuries Lyons claims to have sustained throughout this 15-30 second incident were small bruises on her left wrist and arm, and the claimed swelling of her left knee that did not occur until days later. Lyons did not allege any serious physical injury. *App. 13a.*

5. Lyons successfully defended three criminal charges, and she then filed this civil rights lawsuit against several defendants, including Officers Keith and Foubert, and their employer, the City of Xenia, on November 10, 1999. *App. 5a.*

6. The district court decided a material question of fact existed with respect to the false arrest claim against Keith and the excessive force claims against Foubert and, therefore, the issue of qualified immunity would be decided at trial. *App. 40a.* All other claims against all defendants were dismissed on summary judgment. *Id.* The Sixth Circuit Court of Appeals, in a fractured opinion, reversed and affirmed, in part, the district court decision. Judge Sutton, writing for the majority on the issue of whether there was probable cause to arrest the respondent,[3] reversed the district court and held Officer Keith was entitled to qualified immunity because the

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[2] While Lyons alleged Officer Keith and she were not in physical contact when Foubert arrived, Lyons asserted Officer Foubert told Officer Keith to charge her with assaulting a police officer.

[3] Judge Jeffrey S. Sutton and Judge Julia Smith Gibbons were the majority on the claim of unlawful arrest.

respondent's arrest did not violate a clearly established constitutional right. *App. 12a.*

As for Officer Foubert's use of force, Judge Sutton found all force used by Officer Foubert was constitutionally reasonable in light of the totality of the circumstances. *App. 17a.* Writing for the majority on the handcuffing claim,[4] Judge Sutton held qualified immunity shielded Officer Foubert from suit. *App. 14a.* On the tackling claim, Judge Sutton dissented, opining that Officer Foubert did not violate the Fourth Amendment and also that Officer Foubert was entitled to qualified immunity.

7. Writing for the majority on the tackling claim, Judge Gibbons[5] found that Officer Foubert's use of force would be constitutionally unreasonable if Lyons' version of the facts prevailed. Next, Judge Gibbons opined that the law surrounding the officer's use of force was clearly established such that no reasonable officer would have believed the alleged use of force in those circumstances was reasonable. *App. 22a.*

8. Judge Gibbons, on the tackling claim, found no reasonable officer in Officer Foubert's position would have feared for the safety of his partner in the circumstances alleged by the respondent. *App. 24a.* Judge Gibbons wrote, "it is clear from pre-existing law that a police officer may not tackle a suspect who is arguing with another police officer when the tackling officer has no reasonable basis for believing

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[4] Judge Sutton and Judge Gibbons were the majority on the alleged excessive handcuffing claim.

[5] Judge Gibbons and Judge Tarnow concurred on this point, which is the subject of this petition.

that the other officer's safety is in jeopardy." *App. 27a*. This position is reliant upon no legal authority. Judge Gibbons argues the reasonableness of Officer Foubert's use of force is "entirely dependent" upon which set of facts are believed. *Id*. Furthermore, the majority confined its review of the facts to what Officer Foubert allegedly saw at the moment he ran into the home, i.e., a suspect arguing with a police officer. *Id*.

The majority did not take into account the undisputed call for immediate assistance, or the distressed call for help. It did not take into account the location of Officer Keith inside a suspect's home, the time of night, or other potential dangers to both Officer Foubert and his partner in a private home. Judge Gibbons also failed to consider the critical undisputed fact that Officer Foubert heard Officer Keith's call for back-up – a call evincing both loud background commotion, as well as a distressed tone in Officer Keith's voice.

Whatever the importance of these circumstances in determining the existence of a Fourth Amendment violation, all the undisputed facts Officer Foubert knew ought to have been considered in light of existing case law to determine whether he was entitled to qualified immunity. Quite simply, the court below failed to conduct a proper analysis under *Saucier*.

9. Judge Tarnow argued separately that neither officer was entitled to qualified immunity for any of the claims asserted by the respondent. *App. 30a*. Nevertheless, Judge Tarnow termed Officer Foubert's use of force "borderline," and only found the force used "may" have been excessive. *App. 38a*. Thus, even though Judge Tarnow seemingly acknowledged the law surrounding Officer Foubert's use of force was not clearly established, he still voted to deny the

petitioner qualified immunity based upon what he believed to be Officer Keith's failings.

REASONS FOR GRANTING THE PETITION

I. This Court Should Review The Decision Below Because It Exposes A Developing Circuit Conflict And Sows The Seeds Of Confusion In The Application Of The Qualified Immunity Doctrine Of *Saucier v. Katz*.

A. By Failing To Consider The Totality Of The Circumstances Known To A Police Officer, The Decision Below Exacerbates A Developing Circuit Conflict Concerning How To Analyze Qualified Immunity In The Context Of An Excessive Force Claim.

The key inquiry in this case and in any excessive force/qualified immunity case is judging the officer's behavior based on the totality of the circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 9-10 (1985). In particular, the appropriate timeframe to view an officer's conduct is crucial in determining both whether a Fourth Amendment violation has occurred and, thus, whether the officer may be immune from suit. Unfortunately, the courts of appeal are split on this issue. And the Sixth Circuit's decision below serves only to exacerbate that circuit split.

On one side of the fence, certain circuits have remarkably sliced up the reasonableness analysis under the Fourth Amendment into temporal segments—*i.e.*, pre-incident versus incident versus post-incident occurrences. These courts have adopted a strained understanding of "totality" by unnaturally

compartmentalizing an officer's actions in a way that not only runs contrary to human nature, but also violates the very idea of looking at the "totality" of the facts. *See Claybrook v. Birchwell*, 274 F.3d 1098, 1104(6th Cir. 2001). This approach requires the courts to sever the actual seizure, or use of force to effectuate that seizure, from all preceding events. *See, e.g., Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993; *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994). Under this requirement, the Court should exclude the events leading up to the seizure and focus only on the reasonable considerations of the officer "at the time of" the use of force. *App. 21a.*

On the other side of the fence, several circuits consider all the events leading up to the seizure or use of force. *See, e.g., Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999); *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995); and *Deering v. Reich*, 183 F.3d 645 (7th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct. 532, 145 L.Ed.2d 412 (1999). That is, these courts have noted the apparent contradiction of looking to the "totality of the circumstances" of one segment of time in determining whether the officer's actions were reasonable. For instance, in *Rowland*, the Fourth Circuit stated:

> This approach seems to us to miss the forest for the trees. The better way to assess the objective reasonableness of force is to view it in full context, with an eye toward the proportionality of the force in light of all the circumstances.

Rowland, 41 F.3d at 173.

Similarly, in *Deering*, the Seventh Circuit adopted this "better way" in considering pre-incident circumstances in an excessive force case. In that case, an elderly man was shot when the police were attempting to serve a warrant upon him in the middle of the night. *Deering*, 183 F.3d 645. The plaintiff, who alleged the use of excessive force, wanted to limit the information submitted to the jury about the knowledge held by the officers about the plaintiff at the time of the use of force. *Id.* The Court decided the officer's knowledge of antecedent circumstances was relevant in determining the reasonableness of his actions, saying, "[t]he totality of the circumstances cannot be limited to the precise moment when [the officer] discharged his weapon." *Id.* at 652.

Here, Judge Gibbons employed a segmented approach in assessing the totality of the circumstances. She noted, "[w]hether Officer Foubert's determination about the law was mistaken or unreasonable still depends upon what the circumstances were *at the time* he used force against Lyons." *App. 25a* (emphasis added). The lower court's theory is that if Officer Foubert had seen his partner and respondent tussling on the floor as he alleged, he would have been permitted to use the force he used. *Id.* The claim by Lyons, however, that she was only standing in close proximity and arguing with his partner was not a sufficient basis for the use of force, according to the Gibbons majority reasoning. This reasoning only takes into account the officer's visual perception after he raced in the door and the split second before he allegedly tackled the respondent. The majority's reasoning does not take into account the undisputed radio transmissions or the fact that Officer Foubert's knowledge before racing into the suspect's house where his partner was performing an investigation into a violent assault.

This Court should grant review here to resolve this troublesome conflict among the circuits as to whether it is permissible to segment the reasonableness analysis in a Fourth Amendment excessive force case. The segmented approach that the Sixth Circuit endorsed below turned the Fourth Amendment on its head in this case. That is, the court inappropriately disregarded the information Officer Foubert had as he ran into the Respondent's home that led to his belief that his partner was in danger. Considering the totality of the knowledge held by Officer Foubert and the reasonable inferences he was entitled to draw from that knowledge,[6] Officer Foubert's conduct was reasonable even under the facts as alleged by the respondent and he was, thus, entitled to summary judgment.

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[6] "Before sending a Fourth Amendment question of disputed fact to the jury in a § 1983 case, it must pre-evaluate the reasonableness question by paying close attention to all of the facts, and *even the potential subjective considerations that could have been going through the mind of the defendant officer at the time* (emphasis added), and decide whether there is any doubt as to the question of reasonableness. If the plaintiff does not submit, and/or the court cannot find, authority putting beyond doubt the question of whether a reasonable officer should have known he was violating the § 1983 plaintiff's rights by using excessive force, such that it is *clearly settled* (emphasis in the original), the Court must allow qualified immunity to attach. This doctrine has the effect of taking some jury questions away from the jury, but that is precisely why qualified immunity is a principal of *law* (emphasis in the original), not fact." *Hummel v. City of Carlisle*, 229 F.Supp.2d 389 (S.D. Ohio 2002), citing *Saucier*.

B. On The Second Level Of *Saucier's* Qualified Immunity Doctrine, The Court's Decision Below Manifests A Widespread Confusion Concerning How Specific "Clearly Established" Law Must Be To Permit The Denial Of Qualified Immunity In An Excessive Force Case.

While this Court in *Hope v. Pelzer*, 536 U.S. 730 (2002), attempted to clarify the "second level" of *Saucier*—which asks whether the right was clearly established at the time the officer acted—that Eighth Amendment case has actually misled lower courts into denying qualified immunity despite the fact that existing case law is "distinguishable in a fair way." *See Saucier*, 533 U.S. at 202. *Hope* found that a prior case need not always have materially similar facts to the present one in order to be "clearly established." But *Hope* surely did not abandon what *Saucier* commanded: that an officer loses qualified immunity only if a prior case cannot be "distinguish[ed] in a fair way" from the case at bar. And yet, this is exactly what the Sixth Circuit here failed to realize. The court below adopted an approach that completely eviscerates the "fairly distinguishable" language of *Saucier* in favor of a *carte blanche* mode of analysis under the second prong of qualified immunity. This Court should grant review here in order to provide guidance in reconciling *Hope* with *Saucier*.

In an excessive force case, the facts and circumstances known to the officer furnish the touchstone for Fourth Amendment analysis. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that reasonableness of force depends on "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an

immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). Given that this is so, an officer's immunity against an excessive force claim should not be pierced unless the existing case law makes it apparent that the officer should not have used force *under the particular facts known to the officer at the time he acted.* Judge Gibbons' opinion below commits a common error: it denies immunity without identifying case law that would have provided "fair warning" to the officer in an excessive force case that turns on particular facts. But, more importantly, Judge Gibbons' error underscores lower courts' struggle in understanding how *Hope v. Pelzer* informs the analysis of qualified immunity in an excessive force case.

Here, Judge Gibbons relied heavily on two Ninth Circuit cases decided four and five years *after* the August 18, 1998 use of force by Officer Foubert and distinguished one of the cases relied upon by the dissent based upon the facts. See *Santos v. Gates,* 287 F.3d 846 (9th Cir. 2002); *Meredith v. Erath,* 342 F.3d 1057 (9th Cir. 2003); and *Smith v. Ball State University,* 295 F.3d 763 (7th Cir. 2002). *App. 22a.*

The majority also noted the Ohio Department of Natural Resources (ODNR) Directive § I(A) (February 5, 2001), which was also clearly published after the 1998 incident. Judge Tarnow quoted, "Force used must be: *the most logical, reasonable, and absolutely necessary response* under the circumstances." *App. 36a.* Elaborating, the Court said the most Lyons was doing was standing in close proximity to Officer Keith and screaming. Therefore, the amount of force used by Officer Foubert was *borderline* under the ODNR Use of Force Continuum. *Id.* (emphasis added).

While the decision in *Hope* dictates that police officers can be denied qualified immunity even in novel circumstances presenting obvious constitutional violations, *Hope* also reiterates the *Anderson* requirement that the law be "apparent" such that it gives police officers and other public officials "fair notice" that their conduct is unlawful in any given situation. *Hope,* 536 U.S. at 740. *See Anderson v. Creighton,* 483 U.S. 635, 640, (1987) (holding that before the court can deny a public official qualified immunity, the unlawfulness his or her actions must be apparent). The confusion arises out of the application of the *Hope* statement on clearly established law. In particular, the confusion is most pronounced in the context of Fourth Amendment allegations of excessive force – because, by their very nature, these claims are highly fact intensive. *See Willingham v. Loughnan*, 321 F.3d 1299, 1303 (11th Cir. 2003).

The Eleventh Circuit, in *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), set forth three different types of legal authority courts should use to determine whether the law is clearly established in a given context. When the nature of the use of force alleged is such that there has been an obvious violation of a federal statute or constitutional provision, a finding that the law is clearly established is warranted even in the absence of any case law so holding. *Id.* at 1354, citing the "obvious clarity" discussion in *United States v. Lanier,* 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). For instance, the Court in *Vinyard* cited the government's conduct in *Hope*, where prison guards chained a prisoner to a pole in the heat without water or bathroom breaks for more than seven hours, as an example of obviously unlawful conduct. *Vinyard,* 311 F.3d at 1354. There, the Eighth Amendment was sufficient to give the officials "fair warning" that their conduct was unlawful. *Id.*

Where the government conduct does not obviously violate constitutional or statutory provisions, such as the use of the tackling move alleged by the respondent in this case, the courts could look to case law that either contains broad statements of legal principles that could be shown to apply with "obvious clarity" to the facts at hand or is closely tied to the facts and is not "distinguishable in a fair way." *Id.* at 1351, quoting *Lanier* and *Saucier*, respectively. The Eleventh Circuit consistently follows this procedure. *See e.g., Storck v. City of Coral Springs*, 354 F.3d 1307, 1317 (11th Cir. 2003); *Williams v. Consolidated City of Jacksonville*, 341 F.3d 1261, 1270 (11th Cir. 2003); and *Durruthy v. Pastor*, 351 F.3d 1080, 1092 (11th Cir. 2003).

The standard used by the Sixth Circuit is somewhat less specific. *See Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). The court of appeals said, "in determining whether a right was clearly established, the Sixth Circuit Court looks to the decisions of the Supreme Court, then to its own decisions, and then to the decisions of other circuits." *App. 20a*, following *Dickerson*. Fundamentally more important in this case, is the majority's statement that "even though no case may expressly so hold, it is clear from pre-existing law that a police officer may not tackle a suspect who is arguing with another police officer when the tackling officer has no reasonable basis for believing that the other officer's safety is in jeopardy," without setting forth specific legal authority that would have given Officer Foubert "fair warning" that this was, indeed, true. *App. 27a.*

As the dissent noted, in arguing the law surrounding Officer Foubert's use of force was not clearly established, no other case involving tackling, except in circumstances involving an additional gratuitous use of force, had ever found the amount of force used by Officer Foubert was

unreasonable. *App. 17a. See Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002) and *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991). The dissent also noted that each of the cases cited by the majority were easily distinguishable, because each case deals with circumstances in which the constitutional claimants posed no threat to officer safety. *App. 18a.*

In *Santos*, a high profile case concerning the Los Angeles Police Department, the plaintiff was walking home when the police began to pursue him and he ran away. *Santos,* 287 F.3d 846, 848. When they caught up with him, he was on his knees with his hands interlocked behind his head in a passive position. *Id.* While it is unclear what force the police used on the plaintiff, his back was allegedly broken by the police. *Id.* The Court found the nature of the plaintiff's injury created a material question of fact as to whether the use of force was reasonable. *Id.* at 855.

In *Meredith*, thirteen IRS agents executed a search warrant on the plaintiff's home. *Meredith,* 342 F.3d 1057, 1061. The court decided a reasonable jury could find the force used in handcuffing the plaintiff was excessive when the officer twisted her arm and threw her on the ground. *Id.* The court relied upon a factually similar case from the 9th Circuit. *Id.*

In *Smith*, the police responded to an accident scene with the belief that the driver of the automobile was under the influence. *Smith,* 295 F.3d 763, 766. Again, the court had to rely to some extent upon the officer's version of the facts because the plaintiff was the victim of an epileptic seizure at the time of the use of force. *Id.* Two police officers were pulling the plaintiff out of the car. *Id.* When a third officer arrived on the scene, he believed the plaintiff was resisting simply because he was unresponsive as the other officers

pulled him out of the car. *Id.* He tackled the plaintiff and used a knee strike on the plaintiff's back. *Id.* The court held that this use of force was not constitutionally unreasonable, and did not get to the second step of the qualified immunity analysis. *Id.* at 771.

In *Phelps*, 286 F.3d 295, the plaintiff was in the process of being booked for an open liquor violation when the arresting officer mistakenly thought the plaintiff attempted to kick on of his partners. *Id.* at 297. The officer tackled the plaintiff and handcuffed him. *Id.* After he was handcuffed, the officer beat the plaintiff's head into the floor three times. *Id.* The court was not interested in the tackling issue at all. Instead, the court said there was a material question of fact as to whether the force used after the plaintiff was handcuffed and could pose no threat to the officers was a violation of the Fourth Amendment. *Id.* at 301.

In *Barlow,* the court said, based upon the plaintiff's version of the facts, a reasonable jury could conclude the plaintiff was tackled from behind and placed in an extremely painful and punishing pain compliance hold solely for accidentally bumping into a demonstrator's placard. *Barlow*, 943 F.2d 1132. There was no allegation that the plaintiff posed a threat to the officers or anyone else. The Court does not address qualified immunity.

In Officer Foubert's motion for summary judgment based upon qualified immunity, he cited additional Sixth Circuit case law not addressed by the majority. *Palshook v. Jarrett*, 120 F.Supp.2d 641 (N.D. Ohio 2000). As in this case, the plaintiff in *Palshook* suffered some minor bumps and bruises. *Id.* Additionally, just as in this case, there was a dispute as to the technique the officer used to take the plaintiff to the floor, i.e., the plaintiff alleged a "tackle" as opposed to a

"balance displacement technique." *Id.* at 655 The court, however, said that the use of the word "tackle" is not sufficient to amount to a material issue of fact. *Id.* The plaintiff alleged the officers had no need to use force at all, but the court held the use of force by the officer was constitutionally reasonable. *Id.* at 656.

Despite the conflicting legal authority in this case, the majority decided the law was clearly established that Officer Foubert's use of force was unconstitutional. The courts generally state that, "when determining whether a reasonable officer would have been aware of a constitutional right, we do not impose on the official a duty to sort out conflicting decisions or to resolve subtle or open issues. 'Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'" *Roe v. Texas Dept. of Protective and Regulatory Services*, 299 F.3d 395, 410 (5th Cir. 2002), citing *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir.1992).

The Sixth Circuit did not follow this reasoning in this case. The law cited by the Court was conflicting and, as demonstrated above, was distinguishable in a fair way. This Court should grant review and clarify that when the alleged constitutional violation is not obvious on its face, the plaintiff or the court below must set forth legal authority on the issue that demonstrates the law is apparent in its particular facts such that any reasonable officer would know that his use of force is in violation of the Fourth Amendment on a given set of circumstances.

Additionally, all of the legal authority regarding "tackling" that the majority lies on was rendered after the incident in this case, and this Court should mandate that courts, in deciding the law was clearly established at the time

of the incident, set forth legal authority that was in effect at that time, and to which an officer could have looked for guidance on the legality of his actions. *See Robinson v. Balog,* 160 F.3d 183, 187 (4th Cir.1998), *citing Harlow v. Fitzgerald,* 457 U.S. at 818, 102 S.Ct. 2727.

Because the court of appeals, in its fracture decision, failed to set forth any pre-incident legal authority that demonstrated the law surrounding Officer Foubert's use of force was unreasonable, this Court should reverse and set forth factors the court should apply upon remand.

II. This Court should create an exception to or limit the precedential effect of the "constitutional-question-first" rule, recently addressed in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), when such rule operates to create "clearly established" law and the declared law in turn operates under *Saucier* to generally overcome the qualified immunity of police officers making similar split-second decisions.

This case also presents the Court with the opportunity to relax the "constitutional-question-first" procedure mandated by *Saucier*, 533 U.S. 194, and recently addressed by this Court in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004). The court of appeals finding that the use of force in this case was unconstitutional has, in accordance with the underlying purpose of the Saucier procedure, set precedent that will have an obvious and detrimental impact upon police officer response to emergency situations. This Court should either set forth exceptions to the mandatory nature of the procedure or set forth a more clear standard in how the courts should determine clearly established law, thereby limiting the precedential effect of certain constitutional decisions,

particularly with regards to excessive force cases, which by their very nature are often highly fact sensitive.

When discussing the two-part qualified immunity set forth in Saucier, this Court emphasized the importance of analyzing the both steps of the qualified immunity analysis and in that specific sequence:

> This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were the court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Saucier, 533 U.S. at 201.[7] Deciding the constitutional question before determining whether the right at issue was clearly defined benefits both public officials and the general public by constantly clarifying the law surrounding given

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[7] The concern of the Court that the law will not be clarified if immunity continues to be granted without first defining the constitutional violation appears to be, on some level, not grounded in the case law and, perhaps, limited by the Court's holding in *Hope*. For instance, in *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997), the Court based its holding that the law surrounding excessive force in handcuffing was clearly established based upon an earlier holding that had simply denied qualified immunity based upon a question of fact, not because the court actually held there was a constitutional violation. Furthermore, *Hope* apparently permits courts to base findings of clearly established law upon general legal reasoning rather than requiring a specific holding that some act has been previously declared unconstitutional.

circumstances. *See County of Sacramento v. Lewis*, 523 U.S. 833, 840-842, n. 5 (1998). This specific sequence of constitutional-question-first procedure is also designed to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226 (1991).

Generally, the constitutional question addressed by the courts upon a *Saucier* qualified immunity analysis is "constitutional dicta," because the decision on qualified immunity depends upon whether or not the constitutional right alleged to have been violated was clearly established at the time of the incident not whether there was an actual constitutional violation. *Horne v. Coughlin*, 191 F.3d 244, 247 (2nd Cir. 1999). In normal circumstances, such dicta would have very little precedential value. However, as clearly evidenced by this Court's holding in *Saucier*, the particular constitutional dicta in a qualified immunity is mandatory.

This Court, however, has also recently recognized the dilemma created by the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity." *Bunting*, 124 S.Ct. 1750, 1751.

In *Bunting*, certiorari was denied after the court of appeals had granted a public official qualified immunity. Qualified immunity was granted only after the court established the existence of an important and far-reaching constitutional right that mandatory supper prayers at military colleges violate the students' First Amendment right to be free from religious coercion. In that case, the court of appeals had no difficulty

deciding the law was not clearly established on whatever constitutional right was being alleged, but proceeded to address the constitutional question in the proper sequence required by Saucier. This Court denied cert, in part, because there was no longer a live controversy over which the court had jurisdiction since the petitioner had been granted a favorable ruling on qualified immunity below. The same is not true in this case, because Officer Foubert was denied qualified immunity.

As Justice Scalia pointed out in his dissent in *Bunting*, because of the mandatory nature of the constitutional-first-procedure and the precedential effect of those constitutional decisions, lower courts have taken steps to limit the procedure's effect. *Bunting*, 124 S.Ct. at 1754-1755.

In this case, the effect of the constitutional-question-first procedure is particularly striking. The majority of the court of appeals, in analyzing the mandatory first step of the qualified immunity procedure, held Officer Foubert's actions, as alleged by the plaintiff, violated the constitutional right to be free from excessive of force. *App. 23a.* In doing so, the court has declared it unconstitutional for a police officer responding to an emergency situation such as that that confronted Officer Foubert, to tackle, without causing injuring, the suspect. Future use by police officers of similar force in similar circumstances, at least in the Sixth Circuit, will be denied qualified immunity such that all such cases will require determination by a jury. This impact upon the law of qualified immunity remains in effect even though, upon remand to the trial court, a jury may find that Officer Foubert's conduct was perfectly reasonable and not a violation of the Constitution.

The effect of the constitutional ruling in this case could have far reaching impact upon police officers throughout the Sixth Circuit and, possibly, beyond. Keep in mind, the courts look to these constitutional rulings to determine whether the law is clearly established in each case. The majority's holding that, based on the facts as alleged by the plaintiff, Officer Foubert's use of force violated the constitutional rights of the respondent will be looked to in all factually similar cases. Officer Foubert or another officer that finds him or herself racing inside a suspect's home to assist a fellow officer will need to think twice about any use of force, unless of course actual physical contact can be immediately observed.

The public policy reason for requiring the constitutional question first in a qualified immunity analysis is also not strong in cases such as this, where public officials rather than public entities are being sued in their individual capacity. *County of Sacramento v. Lewis*, 523 U.S. 833, 859, 118 S.Ct. 1708 (1998). For this reason, the Court should accept this case for review and determine the extent to which the constitutional-question-first procedure can be limited or otherwise improved upon. One suggestion provided by the Justice Stevens in *Lewis* is to avoid constitutional questions in cases where the answer is not clear, as here, and permit the law on these issues to be defined in cases in which non-immune public entity has been sued. *Id.*

CONCLUSION

For all of the foregoing reasons, this Court should grant Officer Foubert's petition and reverse the Sixth Circuit's decision.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3282

[Filed January 27, 2004]

CHERYL D. LYONS, Plaintiff-Appellee,

v.

CITY OF XENIA, et al., Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: GIBBONS, and SUTTON, Circuit Judges; and TARNOW, District Judge.*

SUTTON, J., announced the judgment and opinion of the court in which GIBBONS, J., concurred except as to Part II.B.2. TARNOW, J., dissented from the opinion by

* The Honorable Arthur J. Tarnow, District Court Judge for the Eastern District of Michigan, sitting by designation.

SUTTON, J. GIBBONS, J., delivered a separate opinion, in which TARNOW, J., concurred, which constitutes the judgment and opinion of the court on the issue addressed in Part II.B.2 of the opinion issued by SUTTON, J.

JEFFREY S. SUTTON, Circuit Judge. In this interlocutory appeal, police officers Christine Keith and Matthew Foubert challenge the district court's denial of their motion for summary judgment. Cheryl Lyons sued the officers under 42 U.S.C. § 1983, claiming that they violated the Fourth (and Fourteenth) Amendment by arresting her without probable cause and by using excessive force in making the arrest. The district court determined that genuine issues of material fact precluded summary judgment on the officers' qualified-immunity defense. Because we conclude as a matter of law that Officer Keith did not violate any clearly-established constitutional rights, we reverse the district court's judgment denying her qualified immunity. We also reverse the district court's judgment denying Officer Foubert qualified immunity as to the handcuffing, but through an opinion by Judge Gibbons (joined by Judge Tarnow) the Court affirms the district court's ruling that the claim arising from the alleged tackling incident should go to a jury.

I.

On the evening of August 18, 1998, Officer Christine Keith received a call to investigate an assault allegedly committed by Aiesha Ward, a sixteen-year old girl, and her friend Sara Dodd. Officer Keith initially went to the Dodd residence to obtain information from Sara's mother. Aiesha was also present at the Dodd residence. After obtaining the information necessary to issue a citation for Sara, Officer Keith told Aiesha that she wanted to speak with her mother and would follow Aiesha to her residence.

Upon arriving home, Aiesha told her mother, Cheryl Lyons, that a police officer was with her, at which time Officer Keith informed Lyons that Aiesha had assaulted another girl. After several exchanges with Lyons, Officer Keith turned to Aiesha and asked for her name and address. Lyons interrupted and told her daughter to stop answering questions because Lyons needed more information. Officer Keith responded that if she could not finish questioning Aiesha, Aiesha would have to come "downtown" with her, to which Lyons answered that Keith "was not taking her daughter anywhere." Lyons claims that during this interchange she told Keith to leave, but that Keith refused, citing her need for information. But Lyons next told the officer to take a seat because she needed to take her blood pressure medicine.

When Lyons walked into the kitchen to get her medicine, Officer Keith followed her. At that point, the verbal confrontation between the two women grew more heated as Officer Keith repeated her requests for information regarding Aiesha. Responding to what she perceived as Officer Keith's "badgering," Lyons became angry and cursed at the officer. Officer Keith claims that in response to Lyons' obscenities, she advised Lyons to calm down and cooperate.

At some point during this verbal exchange, Lyons noticed Officer Keith tightening her right fist down at her side. Keith allegedly took an "aggressive" step toward Lyons, closing the space between the women from three feet to two. Lyons then told the officer: "I'm not scared of you. I know you cannot hit a police officer, I am not stupid." Keith gives a different rendering of this remark, claiming that Lyons warned her that if she was not wearing a badge, that she would "slap the 'sh[-] out of" her. According to Keith, Lyons continued to scream obscenities and "got up in [her] face," at which point Keith

advised her to back down. Lyons admits that both were "screaming."

Both women agree that Lyons made some sort of hand gesture at this point. According to Lyons, she raised her index finger at the officer, demanding, "[d]amnit, didn't you just hear what I said?" (referring apparently to wanting the opportunity to take her medicine before answering questions). Officer Keith describes the incident as Lyons "rais[ing] her hand towards" Officer Keith's face.

Officer Keith grabbed Lyons' wrist after the finger-pointing/hand-raising episode. In response, Lyons immediately pulled her wrist away. Although Officer Keith claims to have told Lyons she was under arrest, Lyons denies hearing this, claiming that she did not think she was being arrested. It is undisputed that Lyons pulled her wrist away from Officer Keith's grasp and either attempted to, or did, walk away.

According to Lyons, after she pulled her wrist away, she walked into the front room and Officer Keith followed her there. Lyons denies having any additional physical contact with Officer Keith aside from when Keith grabbed her wrist. By contrast, Officer Keith claims that after Lyons pulled her wrist back, the two women struggled as Keith attempted to handcuff Lyons, and Lyons ultimately punched her in the left eye during the struggle. Lyons denies hitting Officer Keith.

At some point during this struggle, all agree. Officer Keith radioed for backup. The call went to Officer Foubert who says he heard Officer Keith "yelling for help" with a distressed tone in her voice, as well as commotion in the background. Lyons claims that a few moments after Officer Keith made the call, Officer Foubert came running into the

house through the front door at full speed. In what Lyons and Aiesha describe as a football tackle, Officer Foubert knocked Lyons to the ground. Lyons claims that her left knee hit the ground and that she was lying on her stomach, with Officer Foubert, a 5'11", 240 lb. man, on top of her midsection. She told the officer that she could not breathe. According to Lyons, Officer Foubert then "threw" Lyons on her right side, and handcuffed her with her arms behind her back.

Officer Foubert gives a different version of the events. As he entered the house, he saw the two women struggling with each other on the floor, side-by-side. By that time, Officer Keith had already placed a handcuff on one of Lyons' arms. Officer Foubert pulled Lyons away from Keith by picking her up, then leaned her over a chair, using a "balance displacement technique." It is undisputed that the two officers picked Lyons up under the arms following the tackle/balance displacement technique, and they assisted her out to Keith's cruiser. Keith transported Lyons to the station without further mishap, where she was charged with obstructing official business, assault, and resisting arrest.

Lyons was tried before a jury, which acquitted her on all three charges. Following the acquittal, she filed suit against the City of Xenia, Chief of Police Eric Prindle, and Officers Keith and Foubert, raising claims under 42 U.S.C. § 1983 and state tort law. Because Lyons acknowledged in a pleading that all of her claims against the City of Xenia and Chief Prindle, as well as her claims brought under state law against all four defendants, were meritless, the district court entered summary judgment on these claims.

With respect to the claims remaining against Officers Foubert and Keith, Lyons alleged that the officers violated her Fourth Amendment rights by arresting her without probable

cause and by using excessive force in the course of making the arrest. Reasoning that no evidence linked Officer Foubert to the false-arrest claim or Officer Keith to the excessive-force claim, the district court granted the officers' summary judgment motions on these claims. The district court, however, rejected Officer Keith's argument that as a matter of law she had probable cause to arrest Lyons, and rejected Officer Foubert's argument that as a matter of law he did not use excessive force in arresting Lyons. The district court likewise rejected the officers' qualified immunity defenses. If believed, the court concluded, Lyons' presentation of the evidence would show that the officers violated clearly-established constitutional rights. In response, the officers filed this interlocutory appeal.

II.

In an interlocutory appeal from the denial of a motion for summary judgment on qualified- immunity grounds, we have jurisdiction to review the legal question whether qualified immunity should have been granted. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Mitchell v. Forsyth*, 472 U.S. 511,527 (1985). The district court's own assertion that genuine issues of material fact preclude summary judgment on qualified-immunity grounds does not bar us from exercising appellate jurisdiction over, and reviewing anew this legal question. *See Doe v. City of Roseville*, 296 F. 3d 431,437-38 (6th Cir. 2002) (quoting *Turner v. Scott*, 119 F.3d 425,428 (6th Cir. 1997)).

To determine whether qualified immunity applies, we ask two questions. First, do the facts alleged, when viewed in the light most favorable to the plaintiff, demonstrate that the government official violated the claimant's constitutional rights? *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Second, in the event a constitutional violation occurred, was the right at issue so clearly established at the time of the incident that a reasonable official should have been aware of its existence? *See id.* at 201-02. Only if the answer to both questions is yes may an officer's motion for qualified immunity be denied. *See id.* at 202. Because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," immunity should be granted where reasonable officers could fairly disagree about the existence of a constitutional violation. *See Malley v. Briggs*, 475 U.S. 335,341 (1986).

A.

It has long been true that the Fourth Amendment requires probable cause for an arrest. *See Crockett v. Cumberland College*, 316 F.3d 571,580 (6th Cir. 2003). And it has long been true that this inquiry turns on whether the "facts and circumstances within the officer's knowledge [] are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31,37 (1979). Courts look at this question through the lens "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001) (citations omitted); *cf. Graham v. Connor*, 490 U.S. 386, 396 (1989) (applying the same test in the context of judging the reasonableness of force used by officers).

In this instance, the City of Xenia charged Lyons with violating three of its ordinances: (1) obstructing official business; (2) assault; and (3) resisting arrest. To the extent probable cause exists for any one of these charges, the arrest

was lawful and our analysis is complete. *See, e.g., Weaver v. Shadoan*, 340 F.3d 398, 407 (6th Cir. 2003).

The Xenia ordinance against obstructing official business tracks the language of the Ohio code: "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's lawful capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." Xenia, Ohio, Ordinance § 608.06; Ohio Rev. Code Ann. § 2921.31. A conviction under the Ohio provision requires (1) the performance of an unprivileged act (2) with the purpose of preventing, obstructing, or delaying the performance by a public official of an authorized act within his official capacity (3) which hampers or impedes the public official in the performance of his lawful duties. *City of North Ridgeville v. Reichbaum*, 677 N.E.2d 1245, 1248 (Ohio Ct. App. 1996).

Lyons' actions plainly satisfy the second and third elements of this probable-cause inquiry, as shown by the following sequence of events--which is not disputed, either because Lyons admitted to the conduct or because she did not contradict other evidence presented on the point. Lyons prevented Officer Keith from questioning her daughter, telling Aiesha not to answer any questions until Officer Keith provided more information. When Officer Keith responded that if she could not finish questioning Aiesha, Aiesha would have to come "downtown" with her, Lyons replied that she "was not taking her daughter anywhere." Lyons then told Officer Keith that she needed to take her blood pressure medicine before they could continue the discussion, and she went into the kitchen to do so. After Keith followed her into the kitchen, Lyons cursed at Keith, and the altercation continued to intensify until the two women were "screaming"

at each other. At some point during the encounter, Lyons pointed her index finger at Keith and swore at her again. On this record, it is clear that Lyons intended to, and did, delay Officer Keith's investigation.

The critical issue in the district court's view, and in ours as well, is whether these facts satisfy the first element of the test--the performance of an unprivileged act. Under Ohio law, this requirement demands an affirmative act that interrupts police business. *See City of Hamilton v. Hamm,* 514 N.E.2d 942, 943-44 (Ohio Ct. App. 1986). A person may not be convicted of the offense simply by doing nothing, such as refusing to provide identification or other information to the police. *See State v. McCrone,* 580 N.E.2d 468,470-71 (Ohio Ct. App. 1989).

In deciding that Lyons' actions did not amount to sufficient affirmative acts to give rise to probable cause, the district court emphasized that the conduct of Lyons differed considerably from the affirmative acts of the defendant in *State v. Merz,* No. CA97-05-108, 2000 WL 1051837 (Ohio Ct. App. July 31, 2000). In *Merz,* the Ohio Court of Appeals sustained a conviction for obstructing official business where the defendant refused to provide identification when officers questioned him about dogs that he had allowed to run loose. *Id.* at *2. The defendant verbally abused the officers, physically moved away from them and into his house, and unequivocally indicated that he would physically resist any attempt by police to calm or restrain him—all of which, the court determined, combined to satisfy the affirmative-act requirement for obstructing official business. *Id.*

The facts *of Merz* and this case, as an initial matter, have more in common than the district court concluded. The defendant in *Merz,* it is true, took physical steps to resist the

officers. But the Ohio Court of Appeals did not rely on this fact in determining whether the officers had probable cause to arrest. Rather, the court determined that probable cause existed *before* the defendant's physical resistance, when he "unequivocally indicated that he would not provide any identification and that he would physically resist any attempt to calm or restrain him." *Id.* While Lyons appears not to have made such an "unequivocal" statement of resistance to Officer Keith, she undoubtedly demonstrated her hostility and unwillingness to cooperate in physical and verbal ways.

More fundamentally, other Ohio courts have concluded that the affirmative-act requirement may be satisfied on the basis of conduct that is not far afield from what occurred here. For example, hostile or abusive speech that obstructs officers from fulfilling their duties may amount to a sufficient affirmative act to sustain a charge of obstructing official business. *See State v. Stayton*, 709 N.E.2d 1224, 1227 (Ohio Ct. App. 1998); *see also State v. Overholt*, No. 2905-M, 1999 WL 635717, at *3-4 (Ohio Ct. App. Aug. 18, 1999) (defendant's "interference with the officers' attempts to complete an arrest, coupled with his repeated, prolonged, and profane outbursts" were unprotected fighting words and constituted sufficient "acts" to support a charge under Ohio Rev. Code Ann. § 2921.31). If the volume and demeanor of the defendant make it impossible for police to question another individual, the act requirement is also met. *See City of Warren v. Lucas*, No. 99-T-0019, 2000 WL 655446, at *3 (Ohio Ct. App. May 19, 2000); *see also Reichbaum*, 677 N.E.2d at 1248-49 (finding sufficient affirmative acts where defendant prevented officers from questioning his stepdaughter about a neighbor's complaint of a disturbance at the defendant's home by repeatedly interrupting the questioning and refusing to be led away from his stepdaughter). Where the overall pattern of behavior is one of

resistance, moreover, officers may consider the totality of the events, and need not point to a single act that rises to the level of obstruction. *See id.* at 1248-49. *See also Overholt*, 1999 WL 635717, at *2 ("Rather than viewing the acts of a defendant in isolation, the total course of the defendant must be considered.").

Measured by the lessons from these precedents, Lyons' conduct would allow a reasonable officer to conclude that she had committed affirmative acts that interfered with police business. The complete picture after all includes more than just Lyons' refusal to provide information; it also includes profanity-laced yelling and finger-pointing at the officer, as well as the disruptive character of her speech—i.e. its volume, demeanor, etc.—as in *Lucas*. Add to this Lyons' simultaneous refusal either to let Keith take Aiesha down to the station or to answer Keith's questions about Aiesha, and it becomes clear that Lyons' uncooperative and hostile behavior would give a reasonable officer cause to believe that an arrest for obstructing official business was appropriate.

Nor need we determine exactly where Ohio draws the line on the affirmative-act requirement. In ascertaining whether a constitutional violation occurred, the only question is whether Officer Keith had probable cause—not whether the evidence would be sufficient to support a conviction. *See Adams v. Williams*, 407 U.S. 143, 149 (1972) ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.").

Nor need we determine whether Aiesha and her mother consented to Officer Keith's presence in the Lyons' house. The fact is, Lyons has only challenged the constitutionality of the seizure *(e.g.*, a false arrest claim), not the constitutionality

of the search (*e.g.*, the entry into the house). On this record, Officer Keith's conduct did not rise to the level of a constitutional violation, and at all events in view of the less-than-precise contours of Ohio's affirmative-act requirement her conduct did not violate a clearly-established constitutional right. Officer Keith accordingly is entitled to qualified immunity.

B.

Under the Fourth Amendment, individuals also have a right to be free of excessive force when police make an arrest or seizure. *See Graham v. O'Connor*, 490 U.S. 386, 394-95 (1989). As with probable cause, this inquiry turns on the objective reasonableness of the officer's conduct in view of the facts and circumstances facing the officer. *Id.* at 397. In making this evaluation; courts look at "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Id.* (citation and quotation omitted).

The district court concluded that a jury question existed over whether Officer Foubert used excessive force in handcuffing Lyons and in "tackling" her, and that a jury question existed over whether Officer Foubert violated clearly-established constitutional rights in each instance. We consider each conclusion in turn.

1.

According to Lyons, Officer Foubert initially handcuffed her "as tight as he could"—so that the handcuffs were "very, very, very tight." Aside from bruising on her wrist, Lyons does not allege any other injury stemming from the handcuffing and does not allege that the tightness of the handcuffs persisted beyond the moment of handcuffing. Nor does Lyons allege that she complained to Foubert about the tightness of the handcuffs and that he ignored her complaints.

The Fourth Amendment, it is true, prohibits unduly tight handcuffing in the course of an arrest. *See Martin v. Heideman*, 106 F.3d 1308, 1313 (6th Cir. 1997); *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993). And this general principle, it is also true, was "clearly established" under Sixth Circuit case law at the time of Lyons' arrest. *See Martin*, 106 F.3d at 1313.

But not all allegations of tight handcuffing amount to excessive force. In order to reach a jury on this claim, the plaintiff must allege some physical injury from the handcuffing, *see Neague v. Cynkar*, 258 F.3d 504, 508 (6th Cir. 2001), and must show that officers ignored plaintiff's complaints that the handcuffs were too tight, *see Burchett v. Kiefer*, 310 F.3d 937, 944-45 (6th Cir. 2002) (rejecting excessive force claim as a matter of law where officers left defendant tightly handcuffed for three hours because defendant did not initially complain about the handcuffs, and when he did complain the officers responded promptly). *Cf Martin*, 106 F.3d at 1313 (finding district court erred by granting qualified immunity because officers handcuffed the defendant so tightly that his hands became numb and swollen, then failed to respond to the defendant's complaints of pain until thirty-five minutes later).

Lyons cannot satisfy these requirements. She alleges little in the way of physical injuries caused by the handcuffing. And, more critically, she does not allege that her physical complaints to the officers went unheeded. To the contrary, she does not even claim that she told the officers that the handcuffs were too tight. In the absence of an obvious physical problem caused by the handcuffs or a plea by the defendant to loosen them, it is fair to ask how a reasonable officer should know that a problem has occurred. These facts thus do not rise to the level of unconstitutionally excessive force. Because Lyons has failed to show that Officer Foubert used excessive force in handcuffing her, his request for qualified immunity should have been granted.

2.

Whether Officer Foubert applied unconstitutionally excessive force in tackling Lyons likewise turns on what a reasonable officer would have done under similar circumstances. The question is whether the undisputed facts "demonstrate that a hypothetical reasonable officer" would have "known that his actions, under the circumstances, were objectively unreasonable," *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000), not whether Officer Foubert used the least intrusive means available, *see Scott v. Heinrich,* 39 F.3d 912, 915 (9th Cir. 1994) ("Officers thus need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct we identify as reasonable."); *see also Illinois v. Lafayette*, 462 U.S. 640 (1983) (noting in the Fourth Amendment context that reasonableness of governmental activity does not hinge on existence of a less-intrusive alternative).

While this episode submits less readily to an answer than the handcuffing claim, I conclude that Lyons has not stated a constitutional claim and at any rate has not shown that Officer Foubert violated a clearly-established constitutional right. Three sets of undisputed facts point the way: (1) Foubert was responding to a distressed call for backup help from a fellow officer who was inside a suspect's home and outside the view of the public; (2) based on the nature of the call, the location of the encounter and Lyons' admission that Foubert made a running unknocked-and-unannounced entry into the house, Foubert clearly (and fairly) believed that Keith was at risk; and (3) when Foubert entered the house, he saw Keith in close proximity to Lyons and the two of them yelling at each other.

Starting with the first point, the parties do not dispute the circumstances that prompted Foubert's sudden arrival on the scene. It is undisputed that Keith was alone during this confrontation, that she was inside the suspect's house and that she radioed Foubert for backup assistance when Lyons became agitated. When Foubert received the call, he detected a tone of distress in the voice of Keith, his partner of over two years, and he heard commotion in the background. Lyons does not contradict this version of events, and indeed confirms that the two women were screaming at each other around the time of the radio call.

Second, Lyons does not challenge Officer Foubert's perception, or the reasonableness of his perception, that Officer Keith was in distress. After receiving the radio call, Foubert understandably feared for his partner's safety. That Keith was inside the suspect's residence—which contained an unknown number of persons and which was beyond public view—confirmed the perilousness of the situation. Nor does Lyons challenge the constitutionality of Foubert's decision to enter the house without a warrant and without knocking and

announcing his presence, a form of entry that the Fourth Amendment permits only in certain emergency situations. *See Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) ("In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile."); *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994) (describing the scope of the exigency exception to the warrant requirement, which encompasses "risk of danger to police or others"). While Lyons may not be in a position to contradict Foubert's testimony that he thought something "was going wrong" with Officer Keith, she confirms his testimony that he ran into the house, noting that he came "charging" into her house "like a football player" running at "as full speed as you can go in a house." Lyons has offered no explanation why it was unreasonable for Officer Foubert to do just that.

Third, when Foubert came running into the house, it is uncontradicted that he saw Keith and Lyons in close proximity to each other and that Lyons was considerably bigger than Keith. While Lyons denies that she was "wrestling" with Keith and denies punching her, she does not deny that at a minimum the two of them were in close proximity to each other and that considerable commotion and yelling surrounded the scene. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871,888 (1990) (non-moving party must aver specific facts that contradict moving party's version of the facts to receive favorable interpretation of disputed evidence). Indeed, at oral argument, Lyons' counsel agreed that the uncontradicted facts showed that the two women were "very close" to each other when Foubert rushed into the house and that the two women were yelling. Perceiving that Keith seemed scared and in need of assistance, Foubert proceeded to take control of the situation. Whether what happened next was a football-like

"tackle" or the use of a "balance displacement technique" over a nearby chair (which is less of a euphemism than the reader might first suspect, *see Palshook v. Jarrett*, 120 F. Supp. 2d 641,655-56 (N.D. Ohio 2000)) does not affect my view that Officer Foubert acted reasonably under the circumstances.

Either way, it is uncontradicted that Lyons created an apparent threat of safety to a fellow officer inside the confines of Lyons' own home. And it is uncontradicted that whatever the nature of the physical contact between Lyons and Officer Foubert, it did not result in anything approaching a serious physical injury. On this record, it is difficult to second-guess Foubert's decision quickly and aggressively to end the confrontation. Had Foubert charged into a room in which Lyons and Keith were far apart from each other, it might have presented a different situation. But that is not what happened. Foubert acted reasonably under the circumstances, and accordingly his motion for qualified immunity should have been granted.

Consistent with this view, I note that no case (except, now, this one) has held to the contrary in any remotely similar context. In cases where tackling has risen to the level of excessive force, police have either done more than just tackle a suspect, *see Phelps v. Coy*, 286 F.3d 295,298, 302 (6th Cir. 2002) (court found constitutional violation for summary judgment purposes where plaintiff alleged that officers tackled him, hit him, and slammed his head into the floor three times); *Barlow v. Ground*, 943 F.2d1132, 1136 (9th Cir. 1991) (police tackled suspect and put him in punishing "pain compliance hold"), or they have not had an adequate level of suspicion to justify any seizure at all, *see Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000).

The cases cited by my colleagues do not change matters. In each of those cases, the claimants did not pose a tenable threat to the officers' safety, in conspicuous contrast to the circumstances facing Officer Foubert. *See Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir. 2003) (holding that it was objectively unreasonable to throw a lone woman to the ground for protesting a search warrant served by twelve IRS agents); *Santos v. Gates*, 287 F.3d 846, 854-56 (9th Cir. 2002) (determining that a jury could find police used excessive force against the plaintiff by throwing him to the ground and breaking his back after he had dropped to his knees with his hands behind his head and was admittedly "passive"). Neither does the fact that overly-tight handcuffing may result in excessive force bolster this claim. Handcuffing after all violates the Constitution only where the individual complains and the officers refuse to respond and where the handcuffing results in physical injury—a different test designed for very different circumstances. *See supra* Part II.B. 1.

Indeed, in some cases, courts have determined that officers who used levels of force similar to that alleged here did not violate the Constitution or were at least entitled to qualified immunity. In *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002), an officer who arrived late to the scene of an apparent crime perceived two of his fellow officers struggling with a resisting suspect. Although the "suspect" turned out to be an unconscious diabetic, and the other officers were merely trying to remove him from his car, the court found the officer acted reasonably in tackling the suspect (and his fellow officers) to the ground based on what he believed was going on. *Id.* at 771. Although the officers appeared to struggle physically with the individual in *Smith,* whereas Lyons denies having any actual contact with Keith, other facts—that Keith was alone, that she was physically outmatched by Lyons, and that the two women were in close

proximity and screaming—demonstrate that the reasons for concern in this case were at least as strong. Police were also granted immunity from suit for using a somewhat similar level of force in *Saucier,* one of the leading Supreme Court cases on qualified immunity. At a speech given by then-Vice President Gore, a protester (who was known to police as a protester, and not a potential security threat to the Vice President) was half-dragged across the area and shoved or thrown inside a van by police after he unfurled a protest banner. *See Saucier*, 533 U.S. at 198, 209.

All of this is not to say that a plaintiff must present a case directly on point to show that a right was "clearly established." *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). But precedents defining the right in its particularized form still must adequately demonstrate that it should have been "apparent" to a reasonable officer that the actions were unlawful. *See id.* Because Lyons has not satisfied this burden, I respectfully dissent from my colleague's majority opinion on this issue.

III.

For the foregoing reasons, the majority reverses the district court's judgment to the extent it denied Officer Keith's request for qualified immunity and Officer Foubert's request for qualified immunity insofar as it pertains to the handcuffing. At the same time, the majority affirms the district court's judgment denying qualified immunity to Officer Foubert as it relates to the alleged tackling incident, and remands the case for further proceedings consistent with these opinions.

JULIA SMITH GIBBONS, Circuit Judge, concurring in part, writing for the majority in part. I agree with Judge Sutton's opinion in its holdings that Officer Keith is entitled to qualified immunity on Lyons's wrongful arrest claim and that Officer Foubert is entitled to qualified immunity on Lyons's excessive force claim relating to her handcuffing. I disagree with the conclusion that Officer Foubert is entitled to qualified immunity on Lyons's excessive force claim with respect to the "tackle." Because Judge Tarnow also disagrees with Judge Sutton on the "tackle" issue and concurs with this opinion, it is this opinion, rather than Part II.B.2 of Judge Sutton's opinion, that constitutes the majority on the "tackle" issue.

I.

Judge Sutton correctly describes the qualified immunity inquiry. I add a few points, however, that seem pertinent here. In determining whether a right was clearly established, this court will look to the decisions of the Supreme Court, then to its own decisions, and then to the decisions of other circuits. *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). An officer's act may violate a clearly established constitutional right even if that act has not previously and specifically been declared unlawful. *Id.* All that is required is that the unlawfulness of the action be apparent from pre-existing law. *Id.* If the right was clearly established, the court "determine[s] whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Williams v. Mehra,* 186 F.3d 685, 691 (6th Cir. 1999). The operative question "is whether it would be clear to a reasonable officer that his conduct was unlawful in the

situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

In making an arrest, law enforcement officers are entitled "to use some degree of physical coercion." *Graham v. Connor*, 490 U.S. 386, 396 (1989). However, the Fourth Amendment protects citizens who are in the process of being placed under arrest from being subjected to excessive force by the arresting law enforcement officers. *See id.* at 395. Whether the force used in a particular instance is excessive in violation of the Fourth Amendment depends upon the reasonableness of that force. An officer' s use of force is permissible insofar as it is objectively reasonable in light of the circumstances known to the officer at the time of the arrest, "without regard to [her] underlying intent or motivation." *Id.* at 397. Obversely, a use of force is excessive when it is unreasonable under the circumstances of the arrest. *See id.* at 395-96. Determining whether an officer's use of force is objectively reasonable requires that courts consider "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Ultimately, force is objectively reasonable when, "from the perspective of a reasonable officer on the scene," the force would be warranted under the circumstances. *Id.* The issue, then, is whether the force to which Officer Foubert subjected Lyons was warranted under the circumstances from the perspective of a reasonable officer.

Here, we review the denial of a motion for summary judgment in the context of an interlocutory appeal. Summary judgment is not appropriate in the qualified immunity context "if there is a factual dispute . . . involving an issue on which

the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violated clearly established rights." *Buckner v. Kilgore*, 36 F.3d 536, 540 (6th Cir. 1994) (quoting *Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988)). In other words, where "[t]he legal question of immunity is completely dependent upon which view of the facts is accepted by the jury," summary judgment must not be granted. *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994); *see also Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) ("Where . . . the legal question of qualified immunity turns upon which version of facts one accepts, the jury, not the judge, must determine liability." (quoting *Sova v. City of Mount Pleasant*, 142 F.3d 898,902 (6th Cir. 1998)).

II.

In granting summary judgment, Judge Sutton essentially concludes that, even under Lyons's version of events, Officer Foubert would be entitled to qualified immunity. I disagree. Whether Officer Foubert is entitled to qualified immunity on Lyons's excessive force claim relating to the alleged tackle "is completely dependent on which view of the facts is accepted," *Adams*, 31 F.3d at 387, either Lyons's or Foubert's. Because Judge Tarnow agrees with this conclusion, the district court's denial of summary judgment to Officer Foubert on that claim is affirmed.

Several facts are certainly undisputed. Officer Keith and Lyons were yelling at each other and "[i]t got loud." Officer Keith called for backup. Officer Foubert received the call for backup. When he received the call, Officer Foubert heard "muffled noises in the background." Officer Foubert answered Officer Keith's call for backup and ran into Lyons's house. Then, Officer Foubert used force to restrain Lyons. It

is also undisputed that, at the time of the incident, Lyons was significantly larger than Officer Keith physically.

At this point, however, Officer Foubert's and Lyons's accounts diverge. Lyons testified that she was merely standing opposite Officer Keith when Officer Foubert arrived on the scene. Though she admits to arguing verbally with Officer Keith, Lyons denies that she and Officer Keith were engaged in a physical altercation at that time. Lyons contends that Officer Foubert then violently tackled her to the ground from her standing position, without warning. Ward, Lyons's daughter, testified that she witnessed the tackle and characterized it as a "football player tackle" for which Officer Foubert used "all his strength."

Officer Foubert, on the other hand, testified that, prior to arriving at Lyons's home, he heard Officer Keith yelling for help over the radio,[1] which caused him to be concerned for her safety. Officer Foubert claims that, when her entered Lyons's home, Officer Keith and Lyons were on the floor "wrestling." Based on this observation. Officer Foubert deduced that Officer Keith was not in control of the situation. He therefore determined that force was necessary to secure the safety of Officer Keith. According to his account, Officer Foubert then utilized a balance displacement technique that effectively involved picking up Lyons from the ground, pushing her over a chair, and ultimately handcuffing her.

Under Lyons's version of events, Officer Foubert violated her constitutional right against excessive force. A reasonable

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[1] Ward and Lyons agreed with Officer Foubert that Officer Keith requested backup but neither made mention of her yelling for help.

officer would not find it necessary to forcefully bring to the ground a woman verbally arguing with another police officer, even if the other police officer is a woman who is smaller than the suspect. Hence, it would be objectively unreasonable for Officer Foubert to tackle Lyons under Lyons's version of events. On the other hand, if—as Officer Foubert testifies—Lyons and Officer Keith were physically tussling at thetime he arrived, it would be objectively reasonable for him to use force against Lyons, regardless of whether it was tackling or balance displacement, in order to secure Officer Keith's safety, because a reasonable officer in such circumstances would find force to be warranted. Because whether Officer Foubert acted unreasonably and thereby violated Lyons's constitutional right against excessive force depends upon whether the trier of fact accepts Lyons's or Officer Foubert's version of events, Officer Foubert is not entitled to summary judgment under this prong of the qualified immunity analysis.

Judge Sutton concludes that Officer Foubert acted reasonably under either version of events because he would be justified under either scenario in believing that Officer Keith was in danger. I concede that Officer Foubert's actions would be objectively reasonable if, under the circumstances known to Officer Foubert at the time he used force, a reasonable officer would perceive that Officer Keith's safety was in jeopardy and that force was necessary to secure her safety. Yet, I disagree that Officer Foubert had cause to be concerned for Officer Keith's safety under Lyons's version of events and, therefore, believe summary judgment for Officer Foubert is inappropriate.

Of course, even if Officer Foubert violated Lyons's constitutional rights by subjecting her to excessive force, he would still be entitled to qualified immunity if it was not clearly established by law at the time that his actions violated

such rights. This requirement protects officers who make a reasonable mistake as to what degree of force is legally permissible in a particular situation. *See Saucier*, 533 U.S. at 205-06; *see also Greene v. Barber*, 310 F.3d 889, 894 (6th Cir. 2002). No violation of a clearly established right occurs in the excessive force context if an officer mistakenly determines that the law permits the amount of force utilized and if that mistake is reasonable. *See Saucier*, 533 U.S. at 205. Even under this prong of the qualified immunity analysis, Officer Foubert is not entitled to summary judgment. Whether Officer Foubert's determination about the boundaries of the law was mistaken or unreasonable still depends upon what the circumstances were at the time he used force against Lyons. If Officer Keith and Lyons were physically fighting, Officer Foubert would not be mistaken that the law permitted the use of substantial force to secure Officer Keith's safety. On the other hand, if Officer Keith and Lyons were only verbally arguing and Officer Foubert tackled Lyons to the ground, Officer Foubert's determination about the amount of force allowable by law under the circumstances would have been mistaken and unreasonably so. A reasonable officer would know that the law did not permit such a use of force in that circumstance. Making a determination about whether Officer Foubert's actions violated clearly established law, then, turns on whose account is accepted—Lyons's or Officer Foubert's. Therefore, summary judgment is inappropriate.

Judge Sutton's opinion states that it was not clearly established that tackling would be inappropriate in the circumstances alleged by Lyons. His review of case law leads him to conclude that the only cases in which tackling has been found to constitute arguably excessive force are those in which the tackling has been accompanied by other forceful acts or when there was no justification for draining a suspect, making any use of physical force against the suspect

excessive. At least two cases undermine this proposition. In *Santos v. Gates*, 287 F.3d 846 (9th Cir. 2002), the court found in the summary judgment context that tackling a passive individual to the ground could constitute excessive force even when some degree of force against the individual may have been justified. *Id.* at 854-55. Admittedly, in *Santos*, the person complaining of excessive force suffered a broken back as a result of his arrest, *id.* at 850, and the court noted that the extent of his injury was a factor that would support a finding of excessive force. *Id.* at 855. Yet, the court was careful to note that excessive force may occur even when the injuries suffered are minor. *Id.* at 855. *Santos* suggests that, at least in certain circumstances, the tackling of an individual not engaged in a physical altercation with police and whom the police have justification to detain may constitute excessive force.

Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003), suggests the same. In *Meredith*, the plaintiff alleged that an IRS agent executing a search warrant forcibly threw her to the ground and handcuffed her because she loudly demanded to see the search warrant and vociferously objected to the search. *Id.* at 1060. The court found that it was clearly established that in such circumstances the force used against the plaintiff would be objectively unreasonable in violation of the Fourth Amendment. *Id.* at 1061. The court therefore denied the IRS agent's motion for summary judgment on the basis of qualified immunity. *Id.* While the court recognized that the handcuffs were placed tightly on the plaintiff's hands and were not loosened after complaints from the plaintiff, the court focused on the acts preceding the actual handcuffing in finding that the IRS agent's actions could constitute excessive force. *Id.* ("[I]t was objectively unreasonable and a violation of the Fourth Amendment for [the agent] to grab [plaintiff] by the arms, throw her to the ground, and twist her arms while

handcuffing her."). The court analyzed the legality of the overly tight handcuffs separately and as an act of unlawful detention. *Id.* at 1063-64.

Furthermore, even if no case has expressly held that tackling a suspect arguing with another police officer constitutes excessive force, the lack of such a holding is not dispositive. Excessive force claims arise from virtually "limitless factual circumstances." *Saucier*, 533 U.S. at 205. The fact that no court has found an officer's use of force in a factually indistinguishable case to be excessive is not troubling. An officer cannot claim entitlement to qualified immunity merely because the very act for which he is challenged has not previously been declared unlawful. *Dickerson*, 101 F.3d at 1158; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the unlawfulness of his act is apparent in light of pre-existing law, it is clearly established that the act violates the law. *Anderson*, 483 U.S. at 640. Even though no case may expressly so hold, it is clear from pre-existing law that a police officer may not tackle a suspect who is arguing with another police officer when the tackling officer has no reasonable basis for believing that the other officer's safety is in jeopardy.

Such a finding is supported by the fact that overly tight handcuffs can constitute excessive force in certain instances. *See, e.g., Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997). If overly tight handcuffs can constitute excessive force under certain circumstances, it is readily apparent to me that the more physically intrusive, combative, aggressive, and potentially harmful act of tackling can alone constitute excessive force in certain instances.

Although Judge Sutton finds it significant that no case has expressly held that tackling alone can constitute excessive

force, he cites no case holding that tackling alone cannot constitute excessive force, and I have also been unable to locate such a case. In addition, Judge Sutton believes that *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002), presents a case quite similar to the case *sub judice*. The cases may be similar, perhaps, but they are not identical. In fact, *Smith* is eminently distinguishable on one key point. In *Smith,* the suspect who was tackled was in physical contact with the officers whom the defendant officer believed to be in danger. *Id.* at 766. Moreover, though the officers interacting with the suspect were merely trying to remove the unconscious suspect from his car, they were physically struggling with the suspect to do so. Indeed, the court noted that the officers were "forcibly removing" the suspect from his car. *Id.* Hence, it was reasonable for the tackling officer—who perceived his fellow officers as being engaged in a physical struggle with a suspect—to tackle the suspect, even though it rums out that the suspect was in fact unconscious. In this case, under Lyons's version of events, no physical contact was occurring between herself and Officer Keith when Officer Foubert tackled her. The interaction between Officer Keith and Lyons provided Officer Foubert with no basis for determining that Officer Keith's safety was in jeopardy.

Finally, even if tackling cannot constitute excessive force unless coupled with another forceful act, Lyons alleges more than mere tackling. Lyons testified that, after tackling her, Officer Foubert forced Lyons onto her stomach and placed himself on top of her to pin her down. According to Lyons, Officer Foubert exerted such force while on top of her that she had trouble breathing. By Lyons's account, Officer Foubert then "threw" her onto her right side and handcuffed her. These additional actions by Officer Foubert alleged by Lyons support a finding that excessive force was used by Officer Foubert under Lyons's version of events.

III.

Lyons raises a genuine question of material fact as to whether Officer Foubert violated her Fourth Amendment right against the use of excessive force when he tackled or displaced her and as to whether heshould have known that his actions were unlawful. These are issues crucial to whether Officer Foubert is entitled to qualified immunity on Lyons's excessive force claim relating to the alleged "tackle." Consequently, the district court correctly denied Officer Foubert's motion for summary judgment as to this claim, and its ruling on this issue is affirmed. I concur in the remainder of Judge Sutton's opinion.

ARTHUR J. TARNOW, District Judge, concurring in part and dissenting in part. I concur in Judge Gibbons's conclusion that there is a question of fact as to whether the "tackling" amounted to excessive force. However, I must respectfully dissent from my colleagues' disposition of the false arrest claim and from their determination that the handcuffing did not amount to excessive force. I will first address the issue of false arrest.

I. Officer Keith and the Claim of False Arrest

In focusing its analysis only upon whether Officer Keith had probable cause to arrest Lyons, the majority ignores two critical aspects of this case: the situs of the arrest and the absence of a warrant. "The Fourth Amendment 'has drawn a firm line at the entrance to the house,' a threshold which police officers may not cross without a warrant." *Ingram v. City of Columbus*, 185 F.3d 579, 586-87 (6th Cir. 1999) (quoting *Payton v. New York*, 445 U.S. 573, 589 (1980)). At the time of Lyons's arrest, it was clearly established that warrantless arrests occurring inside the home require a showing of probable cause and exigent circumstances. *See Payton*, 445 U.S. at 590. As explained by the *Payton* Court:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

Id. at 588-89 (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)). *See also Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("It is axiomatic that the 'physical entry of

the home is the chief evil against which the wording of the Fourth Amendment is directed.'") (quoting *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972)); *Silverman v. United States*, 365 U.S. 505, 512 n.4 (1961) ("A sane, decent, civilized society must provide some . . . oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.") (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)). Warrantless searches and seizures occurring inside the home are presumptively unreasonable. *Payton*, 445 U.S. at 586.

The Supreme Court recently reiterated the *Payton* rule in *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002). Additionally, the rule is understood in the Sixth and other U.S. Circuits, and under Ohio law. *See Martin v. Mitchell*, 280 F.3d 594, 607 (6th Cir. 2002); *Ingram*, 185 F.3d at 587; *U.S. v. Morgan*, 743 F.2d 1158, 1161 (6th Cir. 1984); *Cleveland v. Shields*, 663 N.E.2d 726, 728 (Ohio Ct. App. 1995); and *Duncan v. Storie*, 869 F.2d 1100, 1102 (8th Cir. 1989). *See also Loria v. Gorman*, 306 F.3d 1271 (2d Cir. 2002), and *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995)(both analyzing warrantless home arrests in the context of qualified immunity). The burden of proving exigency is upon the government. *Morgan*, 743 F.2d at 1162.

The majority reasons that, as long as probable cause exists for any of the three offenses with which Lyons was charged—obstructing official business, assault, and resisting arrest—the arrest was lawful and the Court's analysis is complete. The majority found there was probable cause to arrest Lyons for obstructing official business. Because the arrest occurred in the home, this reasoning, which omits any analysis of exigent circumstances, is incorrect. In addition, I disagree with the majority's finding that Officer Keith had

probable cause to arrest Lyons for obstructing official business.

A conviction for obstructing official business under either the Xenia Ordinance or the Ohio Code requires a showing of (1) the performance of an unprivileged act, (2) done with the purpose of preventing, obstructing, or delaying the performance by a public official of any authorized act within his or her official capacity, and (3) which hampers or impedes the public official in the performance of lawful duties. *See* Xenia, Ohio, Ordinance § 608.06; Ohio Rev. Code Ann. § 2921.31. Under Ohio law, an unprivileged act means an affirmative act which interrupts police business. *See City of Hamilton v. Hamm*, 514 N.E.2d 942, 943-44 (Ohio Ct. App. 1986).

The majority, finding that Lyons committed an unprivileged act, reasons:

> The complete picture after all includes more than just Lyons' refusal to provide information; it also includes profanity-laced yelling and finger-pointing at the officer, as well as the disruptive character of her speech—i.e. its volume, demeanor, etc. . . . Add to this Lyons' simultaneous refusal either to let Keith take Aiesha down to the station or to answer Keith's questions about Aiesha, and it becomes clear that Lyons' uncooperative and hostile behavior would give a reasonable officer cause to believe that an arrest for obstructing official business was appropriate.

It is important to note that, under Lyons's version of the events, she never affirmatively gave Officer Keith permission to enter her home. Rather, Officer Keith entered the home behind Aiesha, and Lyons was shocked to find her there.

Even if this Court assumes that Lyons's lack of objection to Officer Keith's entry amounted to consent, the majority omits the fact that Lyons told Officer Keith to leave her home after Officer Keith refused to provide further background information and before Lyons went to take her blood pressure medication. Until that point, she had done nothing except refuse to provide information, which does not amount to an obstruction ofjustice under Ohio law. *See State v. Collins*, 623 N.E.2d 1269, 1270 (Ohio Ct. App. 1993), *overruled on other grounds by State v. Tolliver*, 1996 WL 715438 (Ohio Ct. App. Dec. 13, 1996); *see also Simmons v. United States*, 390 U.S. 377, 394 (1968) (one cannot be penalized for exercising her constitutional rights).

Thus, Lyons revoked her consent before most of the events constituting an affirmative act occurred. Because Officer Keith had no warrant, she had no official right to remain in Lyons's home after Lyons ordered her to leave. *Cf. Painter v. Robertson*, 185 F.3d 557, 567 (6th Cir. 1999); *State v. Rojas*, 635 N.E.2d 66, 67 (Ohio Ct. App. 1993) (both explaining that an individual may limit or revoke consent to a search). It follows then, that the events which occurred after Lyons directed Officer Keith to leave cannot fairly be used to establish an affirmative act which interrupted police business. Since Lyons did not commit an affirmative act which interrupted police business, there is no need to determine whether the second and third requirements for the offense of obstruction were met.

Furthermore, the government made no showing of exigency. The phrase "exigent circumstances," in conjunction with an arrest occurring in the home, "refers to a situation where the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action." *Morgan*, 743 F.2d at 1162. Exigent circumstances have been

found to exist where officers are engaged in hot pursuit; the suspect presents an immediate threat to the safety of the officer or society; or the suspect is about to escape. *Id.* at 1162-63. Accepting as true Lyons's version of the events, I do not believe any reasonable officer could have concluded there was an "urgent need" to arrest her. *See id.* at 1162.[1]

Moreover, in *Welsh*, 466 U.S. at 753, the Supreme Court explained that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." The Court noted that the exigent circumstances exception to the warrant requirement should rarely be sanctioned when the underlying offense is minor. *Id. See also Payton*, 445 U.S. at 576 (limiting the exigent circumstances exception to felony cases).

None of the offenses with which Lyons was charged are sufficiently grave or violent to allow the police to ignore the warrant requirement. *See* City of Xenia, Ohio, General Offenses Code §§ 608.06, 608.08, & 636.02 (defining each of the charged offenses as misdemeanors). Because the arrest was not lawful, Lyons had the right to resist the arrest. *See* City of Xenia, Ohio, General Offenses Code § 608.08(b) (making "lawful arrest" an element of the crime of resisting arrest); *see also State v. Campana*, 678 N.E.2d 626, 629

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[1] The Sixth Circuit has observed that, whether exigent circumstances exists is a question for the jury if there is room for difference of opinion. *See Ingrain v. City of Columbus*, 185 F.3d 579, 587 (6th Cir. 1999). Here, however, there is no room for a difference of opinion because the government made absolutely no showing of exigency. Since there were no exigent circumstances, it is irrelevant whether Officer Keith had probable cause to arrest Lyons for assault and resisting arrest.

(Ohio Ct. App. 1996) & *Elyria v. Tress*, 595 N.E.2d 1031, 1034 (Ohio Ct. App. 1991) (both explaining that, where a statute makes "lawful arrest" an element of the crime of resisting arrest, an individual may resist an unlawful arrest).[2] Therefore, Officer Keith is not entitled to qualified immunity.[3]

II. Officer Foubert and the Claim of Excessive Force

The right of individuals to be free from excessive force during an arrest was also clearly established at the time of

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[2] In *City of Columbus v. Fraley*, 324 N.E.2d 735 (Ohio 1975), the Ohio Supreme Court recognized severe limitations upon the common law right of an individual to resist an unlawful arrest. The Court held, "In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances." *Id.* at 746 (syl. no. 3 by the Court). The court in *Elyria v. Tress*, 595 N.E.2d 1031, 1034 (Ohio Ct. App. 1991), pointed out that the *Fraley* Court did not have before it a resisting arrest statute making lawfulness an element of the crime of resisting arrest.

[3] This case is distinguishable from *City of North Ridgeville v. Reichbaum*, 677 N.E.2d 1245 (Ohio Ct. App. 1996), in that the arrest in that case occurred outside the suspect' s home. Thus, there would have been no need for the court to determine whether exigent circumstances existed. I, therefore, disagree with the majority's application of *Reichbaum,* as well as *State v. Merz*, 2000 WL 1051837 (Ohio Ct. App. Dec. 13, 1996) to this case. The court's analysis in *Merz* failed to include exigent circumstances. Also, the case is distinguishable in that exigent circumstances could have been found because (1) the suspect attempted to flee, and (2) the dogs he allowed to run loose had attacked other people. No similar circumstances existed in this case.

Lyons's arrest. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). As noted by Judge Sutton, this inquiry turns upon the objective reasonableness of the officer's conduct and depends upon the following factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. *See also* Ohio Department of Natural Resources (ODNR) Directive § I(A) (February 5, 2001) ("Force used must be: the most logical, reasonable, and absolutely necessary response under the circumstances."). Determining whether the amount of force used was reasonable requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396.

In the instant case, the first *Graham* factor does not favor Judge Sutton's position because the offenses with which Lyons was charged are not severe. Nor does the second *Graham* factor bolster his position when viewing the facts in the light most favorable to Lyons. Under her version of the events, the most that she was doing when Officer Foubert charged into the home was standing in close proximity to, and screaming at, Officer Keith. I do not believe, then, that the "tackling" move used by Officer Foubert was "absolutely necessary." At best, the amount of force used by Officer Foubert was borderline under the ODNR Use of Force Continuum.

Moreover, the fact that Lyons's physical injuries were not severe is not fatal to her case. In *Ingrain*, 185 F.3d at 597, the Sixth Circuit explained that a plaintiff "may allege use of excessive force even where the physical contact between the parties did not leave excessive marks or cause extensive physical damage." Section 1983 claims of excessive force

encompass emotional harm and do not necessarily require allegations of assault. *Id. See also Holmes v. City of Massillon*, 78 F.3d 1041, 1048 (6th Cir. 1996) ("This court is not insensitive to the mental anguish that can affect a victim of police brutality and we realize that this emotional harm can often be quite difficult to measure in mere monetary terms.").

One of the cases upon which Judge Sutton relies in concluding that Officer Foubert's action was objectively reasonable is *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002). That case, however, is distinguishable. The plaintiff in *Smith* was a university student who suffered from juvenile diabetes. He lapsed into diabetic shock while driving his car and drove onto a sidewalk on the university campus. The arnpus police were dispatched by a campus shuttle bus driver, who reported a possible drunk driver and stated that the vehicle nearly struck several pedestrians. The police then dispatched a student who worked as a parking attendant, and asked him to investigate the situation. The student approached the car, observed the plaintiff seated in the front, and noted that the car was running. He then tapped on the window, but the plaintiff did not respond. The student contacted police dispatch and told them the plaintiff was incoherent (and may or may not have been intoxicated or on drugs).

Several minutes later, two campus police officers arrived on the scene. After turning off the ignition, they asked the plaintiff to exit the vehicle. The plaintiffdid not respond. The officers then forcibly removed the plaintiff from the car. As they were removing him, a third officer arrived on the scene. Because the first two officers were forcibly removing the plaintiff from his car, the third officer believed the officers and the plaintiff were engaged in a struggle. He attempted to apply a "knee strike" to the plaintiff's leg but slipped, tackling his fellow officers and the plaintiff. The three officers

then held the plaintiff's face to the ground and handcuffed him. When they finally raised the plaintiff to a seated position, one of the officers recognized him from a previous diabetic shock episode.

In determining that the use of force was not excessive, the Seventh Circuit considered the potential threat which a drunk driver poses to public safety. *Id.* at 770. The court concluded that the third officer had reason to believe his fellow officers and the plaintiff were engaged in a struggle. *Id.* at 771.

In the instant case, Lyons was in her own home at the time of the arrest and was clearly not a danger to the public. Unlike the non-responsive plaintiff in *Smith,* Lyons was able to give her own version of events, which contradicts that of Officer Foubert. Under Lyons's version (which did not have her and Officer Keith rolling around on the floor when Officer Foubert entered the home), she was not a threat to either Officer Keith or Officer Foubert. In any event, she was not the type of threat which would warrant her being "tackled," or otherwise placed in such a degrading position, in her own home.

Finally, the conclusion that the amount of force used may have been excessive takes into account the unlawfulness of the arrest. I am certainly mindful that the Sixth Circuit has declined to address the issue of whether an unlawful arrest necessarily makes any use of force excessive. *See, e.g., Young v. Barrett*, 912 F.2d 466 (6th Cir. 1990) (unpublished). The plaintiff in *Young,* however, relied upon *Schiller v. Strangis*, 540 F. Supp. 605, 617 (D. Mass. 1982), which considered the unlawfulness of the arrest in determining whether the amount of force used was reasonable. Here, the unlawfulness of the arrest may also make the handcuffing excessive. Although it is true that excessive force claims

based on unduly tight handcuffing ordinarily require physical injury, this general rule applies where the arrest itself is lawful. *See Neague v. Cynkar*, 258 F.3d 504, 505 (6th Cir. 2001). Without addressing the general issue of whether any degree of force used to effectuate an unlawful arrest is excessive, I believe that, *under the circumstances of this particular case,* the unlawfulness of the arrest is one more factor which militates against a finding that Officer Foubert is entitled to qualified immunity.

In sum, I concur in Judge Gibbons's conclusion that Lyons has presented sufficient evidence to raise a question of fact as to whether the "tackling" amounted to excessive force. I dissent from the majority's determination that the handcuffing did not amount to excessive force. There is a question of fact as to this issue as well.

III. Conclusion

For the reasons stated above, I would affirm the district court's denial of summary judgment to both officers.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-99-603

[Filed January 23, 2003]

CHERYL D. LYONS, Plaintiff,	)
vs.	)
THE CITY OF XENIA, OHIO, et al., Defendants.	)

EXPANDED OPINION; DECISION AND ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. # 27); CONFERENCE CALL SET

Pursuant to 42 U.S.C. § 1983 and state law, Plaintiff Cheryl D. Lyons ("Lyons") filed a Complaint (Doc. # 1) against Defendants City of Xenia (Ohio), Police Chief Eric Prindle ("Chief Prindle"), Officer Christine Keith ("Officer Keith"), and Officer Matthew Foubert ("Officer Foubert"), alleging that Defendants violated rights guaranteed to her under the Fourth and Fourteenth Amendments to the United States Constitution. Lyons alleged in her Complaint that

Officers Keith and Foubert, without probable cause and with the use of excessive force, falsely arrested her on charges of assault, resisting arrest, and obstructing official business. Defendants deny the allegations. Pending before the Court is Defendants' Motion for Summary Judgment (Doc. # 27).

I. Factual Background[1]

On August 18, 1998, Officer Keith was investigating a juvenile assault involving Aiesha Ward, one of two alleged perpetrators.[2] Aiesha is the daughter of Cheryl Lyons, and was sixteen years old at the time of the events in question. Pursuant to her investigation, Officer Keith went to the home of Aiesha's friend, Sara Dodds, the other alleged perpetrator. (Ward Depo. at 45.) When Officer Keith arrived at the Dodds residence, Aiesha was present. (Id.) After speaking with Sara and her mother, Officer Keith told Aiesha that she wished to speak with her mother as well, and that she would follow Aiesha to her home. (Id. at 49-50.)

When Aiesha arrived at her home, she intended to enter her house alone, to give her mother a warning as to why a

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[1] For purposes of ruling on the Defendants' Motion for Summary Judgment, the Court will construe the facts, and all reasonable inferences drawn therefrom, in a light most favorable to Plaintiff, who is the non-moving party.

[2] In their Motion, Defendants cite to the affidavit of Lieutenant Donald R. Persons to establish the facts of the police investigation. (Doc. # 27 at Ex. D.) However, the particular page containing the information on the nature of the investigation is not in the record. Nevertheless, Plaintiff does not dispute that the Xenia Police were investigating an assault, and the Court accepts this background fact as true.

police officer was at her home. (Id. at 57.) However, after she opened the front door, Officer Keith followed her inside without first having asked permission (although Aiesha admitted that an invitation to step inside behind her could reasonably have been inferred by Officer Keith). (Id. at 58-59.) Once inside, Lyons was "shocked" to find a police officer standing in her home. (Lyons Depo. at 183.) Lyons asserts that Officer Keith appeared "mad at the world" at that time. (Id.) Officer Keith asked for additional background information on Aiesha, such as her telephone number, but Lyons told her to "wait a minute," refusing to allow Aiesha to answer Officer Keith's questions until Lyons herself was made more aware of the officer's purpose. (Id. at 185.) Officer Keith informed Lyons that she could either answer the questions or Aiesha could be taken "downtown," at which point Lyons told Officer Keith to leave her house. (Id. at 186.) Officer Keith told Lyons that she would not leave without the information on Aiesha, at which point Lyons responded by telling the officer to take a seat because she (Lyons) had no intention of answering any questions until she had a chance to take her blood pressure medicine. (Id.)

Officer Keith followed Lyons into the kitchen where Lyons had gone to take her medicine. (Id. at 186-87.) While Lyons attempted to take her medication, Officer Keith continued to solicit certain information about Aiesha. (Id. at 187.) Officer Keith's persistence upset Lyons, who started "cursing" at Officer Keith, asking her "who do you think you are" for acting in such a way in somebody's home. (Id.) In the face of Lyons' defiant temperament, Officer Keith, standing about three feet from Lyons, "started tightening her fist" and took a step toward Lyons so that she was standing about two feet from her, insisting again that Lyons provide her with the information she sought. (Id. at 188-89.)

Lyons felt as if she were being "badgered" by Officer Keith, and felt that Officer Keith's actions of taking a step toward her and balling her hand into a fist were "aggressive" and "out of control." (Id. at 188.) After Officer Keith took her step toward Lyons and insisted on collecting the background information, Lyons told Officer Keith that she was "not scared" of her, but that she was "not stupid" and knew that she could not hit a police officer. (Id. at 189.) Then Lyons raised her right index finger, pointed it at Officer Keith, and said "dammit, didn't you hear what I just said." (Id.)

When Lyons pointed her finger at Officer Keith, that officer commented to Lyons that one should never point a finger at an officer, and then attempted to grab Lyons' left wrist. (Id.) Lyons pulled back her wrist and walked from her kitchen into her dining room. (Id. at 190.) Lyons asserts that at the time Officer Keith grabbed her wrist it hurt (id. at 191), but that it did not cause a lasting pain. (Id. at 191-92.) When Lyons went into the dining room, Officer Keith radioed for backup. (Id. at 192.) Shortly thereafter, Officer Foubert, came "charging" into Lyons' house and "tackled" Lyons to the ground. (Id.) Lyons asserts that with Officer Foubert on top of her, she "couldn't breathe." (Id.) Officer Foubert then applied handcuffs to Lyons, tightening them "as tight as he could" (id.), after which the officers picked Lyons up off the ground and took her outside, frisked her, and "shoved" her into a police cruiser. (Id. at 192-93.) Ultimately, Lyons was charged under the Xenia General Offenses Code with misdemeanor assault, resisting arrest, and obstructing official business. (Supp. Police Report of Officer Keith, attached to Pl.'s Memo. in Opp. (Doc. # 36).) Subsequently, a jury found Lyons not guilty on all charges.

In Count One of her Complaint, Lyons avers that she was arrested without probable cause and with the use of excessive force, in violation of her Fourth Amendment rights, and that she was deprived of her liberty, in violation of her rights under the Fourteenth Amendment. In Count Two, Lyons raises state law causes of action of assault, intentional infliction of emotional distress, false arrest and imprisonment, excessive force, and malicious prosecution. In Count Three, Lyons asserts a supervisory liability cause of action against Chief Prindle. Finally, in Count Four, Lyons asserts a municipal liability cause of action against the City of Xenia. In her Prayer for Relief, she seeks both compensatory and punitive damages.

Even though, for purposes of summary judgment, the Court construes all genuine issues of material fact, and any reasonable inferences drawn therefrom, in a light most favorable to Lyons, the Court notes that, for their part, Officers Keith and Foubert deny that they used excessive force under the circumstances. They contend that Officer Keith believed Lyons' act of pointing her finger at her, coupled with Lyons' verbal abuse, rose to the level of assault. In his deposition, Officer Foubert stated that he detected a distressed tone in Officer Keith's call for support (Foubert Depo. at 12), and Defendants argue that he used no more force than appropriate to subdue Lyons when he arrived on the scene. Furthermore, Defendants' expert on police conduct, Samuel D. Faulkner, argues that had Officer Foubert actually used the amount of force that Lyons claims he used, Lyons would have suffered more serious injuries than she did in fact suffer. (Doc. # 27 at Ex. F.)

II. Standards Governing Motions for Summary Judgment

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323; see also Boretti v. Wiscomb, 930 F.2d 1150, 1156 (6th Cir. 1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial") (quoting Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987)). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)(quoting Fed. R. Civ. P. 56(e)). Thus, "once the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1245 (6th Cir. 1995). Read together, Liberty Lobby and Celotex stand for the proposition that a party may move for summary judgment by

demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law, Fed. R. Civ. P. 50). Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); see also Michigan Protection and Advocacy Serv., Inc. v. Babin, 18 F.3d 337, 341 (6th Cir. 1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. Celotex Corp., 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,[3] show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.

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[3] Herein, Lyons attached a purported affidavit to her Memorandum that is neither signed nor sworn. Because Fed. R. Civ. P. 56(e) requires that affidavits set forth facts "as would be admissible in evidence," and because unsworn statements are not so admissible, the Court may not consider the statements included therein. E.g., Bonds v. Cox, 20 F.3d 697, 702 (6th Cir. 1993). In any event, consideration of the affidavit in this instance would not affect the Court's analysis, as the affidavit statements are generally consistent with the statements Lyons made in her deposition.

R. Civ. P. 56(c). Summary judgment shall be denied "if there are ... 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" Hancock v. Dodson, 958 F.2d 1367, 1374 (6th Cir. 1992) (citation omitted). Of course, in determining whether a genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. Anderson, 477 U.S. at 255. If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, Federal Practice and Procedure, § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989), cert. denied, 494 U.S. 1091, 110 S. Ct. 1839, 108 L. Ed. 2d 967 (1990); see also L.S. Heath & Son, Inc. v. AT&T Information Sys., Inc., 9 F.3d 561 (7th Cir. 1993); Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915 n.7 (5th Cir.), cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 59 (1992)("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment . . ."). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

III. Analysis

As an initial matter, the Court notes that Lyons, in her Memorandum in Opposition, acknowledges that the claims set forth in her Complaint related to the City of Xenia and Chief Prindle, and those against Officers Keith and Foubert brought under the *Fourteenth Amendment* and the laws of the State of Ohio, are without merit.[4] (Doc. # 36 at unnumbered pp. 4 & 12.) Accordingly, summary judgment on these claims is granted, and the Court need only consider the remaining § 1983 claims concerning probable cause and excessive force, as well as the applicability of the "qualified immunity" doctrine.

42 U.S.C. § 1983 provides a civil cause of action to any citizen of the United States against any person who, under color of state law, deprives the citizen of "any rights, privileges, or immunities secured by the Constitution and laws of the United States." See Christy v. Randlett, 932 F.2d 502, 504 (6th Cir. 1991) (citations omitted). In order to succeed on a § 1983 claim, a plaintiff must prove two elements: (1) that she was deprived of a right secured by the Federal Constitution or laws of the United States; and (2) that she was subjected to this deprivation by a person acting under the color of state law. See Searcy v. City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994). "By its terms, § 1983 creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." Gardenhire v. Schubert, 205 F.3d 303, 310 (6th Cir. 2000) (citing

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[4] Lyons expressly declined addressing these claims (Doc. # 36 at unnumbered p. 4), and noted in her Memorandum that "the Fourteenth Amendment claims and the State law claims must fail as a matter of law." (Id. at unnumbered p. 12.)

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985)).

There is no dispute that Officers Keith and Lyons were acting within the scope of their official duties as Xenia police officers, and, as such, the Court's focus is on the first element of the § 1983 test: whether Officers Keith and Foubert deprived Lyons of a right secured to her by the Constitution or federal law. Lyons alleges that she was arrested without probable cause, and that Officers Keith and Foubert used excessive force in detaining her, in violation of rights secured to her by the Fourth Amendment. The Court will consider the issues raised in turn.

A. Probable Cause

The Fourth Amendment to the Federal Constitution guarantees that no arrest shall be undertaken without probable cause. "Generally, probable cause exists when the police 'have reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'" Gardenhire, supra, at 315 (quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)). Generally, the existence of probable cause is a question of fact. See id. (citing Pyles v. Raisor, 60 F.3d 1211, 1215 (6th Cir. 1995)). Importantly, it should be remembered that "the Constitution does not guarantee that only the guilty will be arrested." Criss v. City of Kent, 867 F.2d 259, 263 (6th Cir. 1988) (quoting Baker v. McCollan, 443 U.S. 137, 145-46, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)). Whether probable cause existed turns on whether the arrest was objectively reasonable under the circumstances. See id. at 262.

It is Lyons' argument that she was wrongfully arrested at the moment Officer Keith grabbed her wrist in the kitchen (Doc. # 36 at unnumbered p. 9),[5] and Defendants acknowledge that the officer was trying to do just that. (Doc. # 27 at 18; Def.'s Reply Memo. (Doc. # 46) at 4-5, 7, 8.) Thus, it is at this point that the Court must determine whether probable cause existed. Importantly, because of the manner in which Lyons crafts her argument, the Court views the arrest without probable cause claim as applicable only to Officer Keith, as Officer Foubert was not present when Officer Keith grabbed Lyons' wrist in the kitchen, and therefore could not have assisted in any arrest at that point in time.[6]

The questions the Court is tasked with answering are properly sequenced as follows: viewing the facts in the light most favorable to Lyons, and considering the nature of the charges filed against her by Defendant police officers, (1) would a reasonable police officer find probable cause to believe that Lyons had obstructed official business by refusing

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[5] Lyons states: "The arrest occurred when Officer Keith twisted the plaintiff's wrist. At that time she had no probable cause to believe that the plaintiff was causing or attempting to cause physical harm to her."

[6] Obviously, Officer Foubert took part in the arrest at a later point, but because Lyons argues that the wrongful arrest took place in the kitchen, Officer Foubert could only have been assisting in an ongoing arrest. Assisting officers arriving at a scene later in time are not obliged to develop independent grounds for arrest (probable cause) before lawfully assisting an officer already undertaking an arrest. See, e.g., United States v. Valencia, 913 F.2d 378, 383 (7th Cir. 1990)("The police who actually make the arrest need not personally know all the facts that constitute probable cause if they reasonably are acting at the direction of another officer or police agency.")

to provide information useful to Officer Keith's investigation of Aiesha?; (2) would a reasonable police officer find probable cause to believe that Lyons had committed an assault by pointing her finger at Officer Keith?; (3) would a reasonable police officer find probable cause to believe that Lyons had resisted arrest by jerking her wrist away and walking to another room of her house when Officer Keith grabbed her left wrist?

As Lyons was arrested pursuant to the ordinances of the City of Xenia, the Court must review the contours of those laws before it can make a determination on the issue of probable cause. In Xenia, the law governing "Obstructing Official Business" is set out in the General Offenses Code at section 608.06, and reads in pertinent part:

> (a) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his or her official capacity, shall do any act which hampers or impedes a public official in the performance of his or her lawful duties.

(See Def.'s Reply Memo (Doc. # 46) at Ex. A.) A violation of this law is a misdemeanor of the second degree.

The ordinance is identical to Ohio Rev. Code § 2921.31, and for support Defendants cite to, in their Reply, the case of State v. Merz, 2000 Ohio App. LEXIS 3414, 2000 WL 1051837 (Ohio Ct. App. July 31, 2000), in which the Ohio Twelfth District Court of Appeals recognized, 2000 Ohio App. LEXIS 3414, 2000 WL 1051837 at *2, that "overt acts [taken] to impede or obstruct [an] officer's investigation or business" can give rise to an obstructing official business offense. (See Doc. # 46 at Ex. B.) In Merz, it was found that

the criminal defendant had refused to provide identification to officers who were investigating a report that the defendant's dogs were running loose and attacking pedestrians, and that when one of the officers attempted to restrain the defendant, he pushed the officer and attempted to flee.

The suspect in Merz did far more to thwart an investigation than did Lyons, and the Court does not find the facts of that case to be apposite. More instructive is the Merz court's comment that "simply refusing to provide one's information to a police officer may not constitute obstruction of official business."[7] 2000 Ohio App. LEXIS 3414, 2000 WL 1051837, at *2. It is not disputed that Officer Keith had the right to investigate Aiesha's involvement in the juvenile assault. Yet, accepting Lyons' version of the facts as true, all she was doing was delaying in providing Officer Keith with additional information about her daughter, until she could take her blood pressure medication. The question is whether this refusal could be understood by a reasonable officer as the commission of the offense of obstructing official business. After a review of Ohio case law, accepting Lyons' assertions as true, the Court concludes that it could not.

Ohio Rev. Code § 2921.31 has been construed by the Courts of Ohio as requiring an affirmative act in order to trigger culpability. See City of Hamilton v. Hamm, 514 N.E.2d 942 (Ohio Ct. App. 1986) (construing identically worded local ordinance as identical to Ohio Rev. Code § 2921.31); City of Cleveland v. Corral, 591 N.E.2d 1325 (Ohio Ct. App. 1990) (same); State v. McCrone, 580 N.E.2d

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[7] Of course, the fact that a "simple refusal" to provide information may not give rise to guilt beyond a reasonable doubt does not foreclose the conclusion that it might give rise to an objectively reasonable perception of guilt (i.e., probable cause).

468 (Ohio Ct. App. 1998); State v. Stephens, 387 N.E.2d 252 (Ohio Ct. App. 1978); State v. Muldrow, 10 Ohio Misc. 2d 11 (1983); State v. Zefi, 2001 Ohio App. LEXIS 1136, 2001 WL 253149 (Ohio Ct. App. March 15, 2001); State v. Mays, 2000 Ohio App. LEXIS 5175, 2000 WL 1681029 (Ohio Ct. App. Nov. 6, 2000). As the Twelfth District Court of Appeals has stated: "It is readily apparent that one cannot be found guilty of either the statute or the ordinance unless he 'hampers or impedes a public official in the performance of his lawful duties.' Other courts have held, and we agree, that one cannot be guilty of obstructing official business by doing nothing." Hamm, supra, at 943 (citing Muldrow, supra). "The mere failure of a person to respond to an officer's request is not in violation of the ordinance." Id. at 944. Additionally, "the mere refusal to produce identification upon request by a police officer will not support a finding of obstructing official business." Zefi, supra, 2001 Ohio App. LEXIS 1136, 2001 WL 253149 at *4. See also McCrone, supra, at 471 ("refusing to cooperate with a law enforcement officer is not punishable conduct") (citing Columbus v. Michel, 378 N.E.2d 1077 (Ohio Ct. App. 1978)).

Thus, a conviction will only lie where the accused misdemeanant has actually committed an act hampering or impeding official police business. On the matter of probable cause, a reasonable police officer, accustomed to encountering recalcitrant citizens in the regular course of her duty, would certainly be aware of the elements necessary to prove an obstructing official business charge, and would not arrest a citizen on such a charge under the facts as stated by Lyons in her deposition and accepted at this point in time as true. Lyons' only "acts" were her relocating to the kitchen, and her yelling and pointing a finger at Officer Keith. The Court does not find that any of these supposed "acts" constitute

affirmative acts within the ambit of the offense charged; Ohio courts require something more.

When Officer Keith's version of the events are taken into consideration, the facts may reveal that probable cause existed to make the arrest. However, for the moment, the Court may not consider her version of the facts. Under Ohio law, and Lyons' version of the facts, her refusal to supply Officer Keith with the information requested was not an obstruction of official business. Therefore, the Court cannot award Officer Keith judgment as a matter of law at this juncture, as genuine issues of material fact exist with respect to Lyons' conduct on the day in question.

Regarding the charge of assault, Xenia General Offenses Code § 636.02 states that "no person shall knowingly cause or attempt to cause physical harm to another . . .," and "[n]o person shall recklessly cause serious physical harm to another ...." (Doc. # 46 at Ex. A.) The ordinance is identical in all material respects to Ohio Rev. Code 2903.13.

Under Lyons' version of the facts, the sole ground for which Officer Keith arrested her was her act of pointing her finger at her. It may be that Officer Keith felt threatened and assaulted, but it is not evident under these facts that a reasonable police officer would have had probable cause to believe that the offense of assault was being committed. Defendants cite no Ohio case law in support of their argument that the act of pointing a finger at a police officer, even where accompanied by yelling, gives rise to probable cause to believe that the offense of assault is being committed. The Court finds there are genuine issues of material fact as to whether Officer Keith had probable cause to believe that Lyons was assaulting her, and, as such, summary judgment is not proper.

Regarding the resisting arrest charge, the Court must first clarify that it was Lyons' own arrest on which she was charged with resisting, not the arrest of her daughter Aiesha. Defendants, in their Reply, attempt to argue that there were two different grounds for charging Lyons with resisting arrest: her own arrest and that of Aiesha. (Doc. # 46 at 8.) However, the suggestion that Lyons was arrested for resisting the arrest of Aiesha is not well taken. This argument was not raised in Defendant's primary memorandum, and, in any event, because Aiesha was not being arrested, there was no arrest of hers to be resisted.[8] Additionally, the Court rejects Defendants' argument that the refusal by Lyons to immediately provide information about Aiesha gives rise to a resisting arrest charge. Again, Defendants attempt to import facts surrounding Officer Keith's interaction with Aiesha into the calculus surrounding that officer's interaction with Lyons. They cite the holding in Merz, supra, to support their argument that Lyons' refusal to provide information on her daughter constituted resisting arrest. (Doc. # 46 at 8.) The argument is misplaced.

In Merz, the Twelfth District Court of Appeals stated that a "refusal to provide one's identification in the course of a proper investigation of a misdemeanor, even where such does constitute obstructing official business, may provide sufficient grounds for a lawful arrest for the misdemeanor offense of resisting arrest." 2000 Ohio App. LEXIS 3414, 2000 WL

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[8] Defendants state in their Reply Memorandum that "Plaintiff does not dispute that the arrest of her daughter was lawful." (Doc. # 46 at 8.) There is absolutely no basis for this comment, seeing as Aiesha was never placed under arrest. Indeed, if Lyons had been arrested for resisting the arrest of Aiesha, an arrest which was non-extant, it necessarily would have been without probable cause, and would provide yet another basis for Lyons' § 1983 action.

1051837, at *2 (citing State v. Rose, 600 N.E.2d 382, 384 (Ohio Ct. App. 1991) and McCrone, 580 N.E.2d at 472). As noted above, the defendant in Merz was being investigated for a report that his dogs were running loose, a fact which, if true, would have constituted a misdemeanor. When he was approached for identification, he refused to display it. Indeed, when the police insisted on his identification, he shoved one of the officers and attempted to flee. The Twelfth District Court of Appeals held that such conduct constituted obstruction of official business. Furthermore, having determined that the officers had probable cause to arrest or cite him for allowing his dogs to run loose, the court also determined that the defendant's behavior constituted the crime of resisting arrest.

Again, Merz is inapposite to the case at bar. Lyons was not the primary subject of Officer Keith's investigation. If Aiesha, not Lyons, had refused to identify herself to Officer Keith, and had forcefully resisted cooperating in the investigation of the juvenile assault complaint, then Merz would provide a suitable analogy. As it happens, however, Lyons' delay in supplying background information about her daughter before she (Lyons) had an opportunity to take her medication presents an entirely different scenario.

The relevant question is whether, under the circumstances, Lyons' act of snapping her wrist away from Officer Keith gave rise to probable cause to believe that the offense of resisting her own arrest, not that of Aeisha, had taken place. Section 608.08 of the Xenia General Offenses Code states in part that "no person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or of another" (emphasis added). (Id. at Ex. A.) This statute is in all material respects the same as Ohio Rev. Code § 2921.33. Again, the focus of the resisting arrest charge is argued to be Lyons' act

of snapping her wrist away from Officer Keith.[9] As with the assault charge, Defendants submit no relevant case law on what constitutes resisting arrest. Furthermore, the two cases cited in Merz to support the proposition that a failure to provide identification is enough to constitute resisting arrest are, like Merz itself, wholly inapposite. In Rose, the underlying crime giving rise to the arrest for which the defendant was charged with resisting was an ordinance which made it unlawful for a driver of an automobile to refuse to display his identification upon the demand of an officer, when such a demand was properly made. 600 N.E.2d at 384. The trial court found that the defendant had forcefully resisted displaying his license, but had not delayed so long as to violate the ordinance. Id. at 383. However, it found that the defendant's forceful resistance was substantial enough to give the officer probable cause to arrest him on the charge, and supported a finding that the defendant had resisted same. Id. The defendant was therefore found guilty of resisting arrest, even though he was acquitted on the underlying charge for which he was arrested. The Second District Court of Appeals affirmed in all respects. Id. at 384. A similar result, based on a like set of facts, was reached in McCrone, 580 N.E.2d 468.

When the facts of this case are construed in a light most favorable to Lyons, the obvious material difference between this case and the cases upholding convictions for resisting arrest is the apparent absence of probable cause on the part of

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[9] No argument has been put forward by Defendants that any of Lyons' actions subsequent to her snapping her wrist away from Officer Keith provided grounds for the resisting arrest charge. In any event, since they are the events in the kitchen that form the basis of Lyons' allegedly wrongful arrest, the Court presumes the corrollary is also true: that the only resistance at issue is that stemming from the arrest in the kitchen.

Officer Keith to carry out an underlying lawful arrest. "Ohio courts have consistently held that one of the required elements of this crime is a lawful arrest." State v. Barker, 714 N.E.2d 447, 451 (Ohio Ct. App. 1998) (citing State v. Hendren, 674 N.E.2d 774, 775-76 (Ohio Ct. App. 1996)). "Ohio courts have also consistently held that an arrest is lawful if the officer had probable cause . . . , even if the defendant is ultimately found not guilty . . . ." Id. (citations omitted); see also Rose, 600 N.E.2d at 383 ("A lawful arrest is a necessary element of the crime of resisting arrest," and an arrest is "lawful" if supported by probable cause); McCrone, 580 N.E.2d at 471. Thus, even if the snapping of the wrist were reckless or forceful, a preliminary question is whether the arrest for obstructing official business or assault was lawful (i.e., supported by probable cause). As noted, this latter question cannot be answered by the Court at this time. In other words, whether probable cause existed as to the resisting arrest charge cannot be determined with finality until it is first determined whether Officer Keith had probable cause to believe Lyons had committed at least one of the other two charged offenses, those being assault and obstructing official business.

The Court need not determine at this time whether the reflexive snapping away of one's wrist constitutes forceful or reckless resistance of an arrest, because it is plain that where there is no legal basis for a lawful arrest, a charge of resisting arrest will not lie. Accordingly, because the Court has found that genuine issues of material fact exist as to whether Officer Keith had probable cause to believe that Lyons had assaulted her or had obstructed official business, it also finds that genuine issues of material fact exist as to whether Officer Keith had probable cause to believe that Lyons had committed the crime of resisting arrest. For these reasons, Defendants' Motion for Summary Judgment is OVERRULED with respect

to Lyons' allegations that her Fourth Amendment rights were violated when Officer Keith arrested her. With respect to Officer Foubert, said Motion is SUSTAINED as to this issue.

B. Use of Excessive Force

A claim that officers used excessive force in carrying out an arrest invokes the protections of the Fourth Amendment, which guarantees citizens the right to be secure in their persons. See Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1988). Thus, whether an officer's use of force is excessive, that is, whether it is unreasonable under the circumstances, must be analyzed under the Fourth Amendment's "reasonableness" standard. Id. at 395. "Some degree of physical coercion or threat thereof" is constitutionally acceptable when police officers are effecting a stop or full arrest. Id. at 396. Importantly, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Id. (internal quotation and citation omitted). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Id. at 396-97.

The Complaint does not set forth the specific facts on which Lyons bases her allegations of excessive force. Furthermore, in her Memorandum in Opposition, Lyons only vaguely elaborates on this aspect of her Complaint, relying mainly on her own blanket statement that Officers Keith and Foubert used excessive force. The Court extracts from Lyons' Memorandum three potential bases for the excessive force claim: Officer Keith's act of "twisting" her wrist when she first attempted to arrest Lyons in her kitchen; Officer

Foubert's "tackling" of Lyons when he entered her house; and the "tightness" with which the officers applied the handcuffs. (See Doc. # 36 at unnumbered p. 11.)

As for the alleged "twisting" of Lyons' wrist by Officer Keith, the Court notes that Lyons, in her deposition, stated that she did not believe Officer Keith's use of force in "twisting" her wrist was excessive. (Lyons Depo. at 207.) Furthermore, this was the only physical contact that Lyons had with her. (See id. at 199-200.) Therefore, because there is no evidence in the record, as would be admissible at trial, see Fed. R. Civ. P. 56(e), supporting an excessive force claim against Officer Keith, summary judgment on this issue is appropriate with respect to this Defendant.

With respect to the application of the handcuffs, Lyons states that Officer Foubert pulled the handcuffs "as tight as he could get them," so that they were "very, very, very tight." (Lyons Depo. at 203.) Furthermore, Lyons has submitted photographic evidence of a bruise on one of her wrists allegedly resulting from the tightly applied handcuffs. (See id. at Ex. G.)

In Martin v. Heideman, 106 F.3d 1308, 1310 (6th Cir. 1997), a § 1983 plaintiff testified that he was handcuffed so tightly that his hands swelled and went numb. In that case, the Sixth Circuit held that evidence of "excessively forceful handcuffing" is a proper ground for an excessive force claim. Id. at 1313.

The Court finds that Lyons' deposition testimony raises a genuine issue of material fact as to whether Officer Foubert applied the handcuffs to her wrists in an excessively forceful fashion. Consequently, Defendants' summary judgment motion on this issue must be denied. The Court notes again

that this aspect of the claim applies only to Officer Foubert, who applied the handcuffs; it does not apply to Officer Keith.

The remaining excessive force issue is whether Officer Foubert used excessive force when he allegedly "tackled" Lyons. As noted above, when considering the constitutionality of an officer's use of force, a court must be mindful of the particular circumstances in which the officer found himself. Here, under Lyons' version of the facts, the most that can be said is that she was being uncooperative with Officer Keith. There is no evidence that Officer Keith's person was in jeopardy. Nevertheless, Lyons alleges that Officer Foubert charged into her house as if he were on a football field, tackling her at "full speed." (Lyons Depo. at 192, 200.) Accepting this evidence as true, as the Court must in ruling on Defendants' Motion, it raises a genuine issue of material fact as to whether Officer Foubert's actions were excessive and unreasonable under the circumstances.

At the time of the occurrence in question, Lyons was forty-three years old, approximately five feet, four inches in height, and weighed about 175 to 180 pounds. (Id. at 175.) Officer Foubert, by comparison, was approximately five feet, eleven inches tall, and weighed between 230 and 240 pounds. (Foubert Depo. at 8.) Defendants make much of the lack of evidence in the record of any permanent injuries suffered by Lyons, construing the facts supporting this observation as positive evidence that Officer Foubert did not tackle Lyons. Had a man of his size tackled her, Defendants' argue, surely she would have suffered permanent injury.[10] That argument,

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[10] Indeed, as to the whole of Lyons' excessive force claim, Defendants argue that the lack of evidence of any permanent damage resulting from any physical contact with them should be construed by this Court as evidence of the lack of use of excessive

however, goes to the weight of the evidence. For the purpose of summary judgment, the inference Defendants draw, when viewed next to Lyons' deposition testimony, in conflict with such an inference, creates a genuine issue of material fact as to whether Officer Foubert used excessive force.

Because Lyons' deposition testimony tends to show that Officer Foubert used excessive force in both applying the handcuffs to her wrists and in tackling her, genuine issues of material fact exist, and, accordingly, Defendants' Motion must be denied with respect to this issue insofar as it concerns Officer Foubert.

In sum, regarding the issue of excessive force, Defendants' Motion is SUSTAINED with respect to Officer Keith, and OVERRULED with respect to Officer Foubert.

C. Qualified Immunity

In the interest of protecting public officers in the course of performing their discretionary duties from unduly onerous lawsuits under § 1983, the Supreme Court has recognized "qualified immunity" for such officers, "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1986). Thus, in order for a public officer to be held accountable, the law surrounding the right she is charged with violating must be clearly established, and be one about which a reasonable

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force. The Court believes this argument is relevant to weight, in the first instance, and damages, if Officer Foubert is found liable. Herein, the inference Defendants draw conflicts with Lyons' deposition testimony, and creates a genuine issue of material fact.

officer in her position would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1981). Furthermore, the legal right that forms the focal point of the Court's inquiry must be defined with particularity, and not in the abstract. See Anderson, supra, at 639-40. For instance, it is not enough to say that because the general right to due process as guaranteed by the Due Process Clause is clearly established, any specific action later found to be violative of the Due Process Clause is per se violative of "clearly established" law. See id. at 639. Rather, a court must more closely scrutinize "the contours" of the right allegedly violated; it must attempt to analyze that right in a particularized, less generalized, context. Thus, even if a trier of fact could find that a constitutional violation had occurred, the relevant question, in determining whether immunity is appropriate, is whether an officer could have reasonably believed that her actions were lawful, in light of the existing facts and the law as generally understood at the time of her action. See id. at 641.

Even where an action is deemed objectively unreasonable within a Fourth Amendment analysis, that determination does not automatically require a determination that the action could not in any respect have appeared appropriate and reasonable to a reasonable officer at the time. Id. at 643-44. "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity. Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (quoting Anderson, 483 U.S. at 641). Qualified immunity is lost only where the belief in the existence of probable cause is unreasonable. See Malley v. Briggs, 475 U.S. 335, 345, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1985). The same is true in the excessive force context. Even where a genuine issue of material fact exists as to whether an officer used excessive force, that does not prevent

the Court from finding, as a matter of law, that the officer acted reasonably in light of the state of the law as it was then understood. See Saucier v. Katz, 533 U.S. 194, 207-09, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Thus, while reasonableness in the Fourth Amendment context will frequently be left to the trier of fact to determine, reasonableness in the qualified immunity context "ordinarily should be decided by the court long before trial." Hunter, 502 U.S. at 228; see also Saucier, 533 U.S. at 200-01. The distinction in the latter context is that the analysis turns on the legal issue of whether the law surrounding the particularly defined right allegedly violated was "clearly established." To lose the protection of qualified immunity, "in the light of pre-existing law[,] the unlawfulness [of the officer's actions] must be apparent." Gardenhire, supra, at 311.

In determining whether a constitutional or federal right is "clearly established," the Court must look first to decisions of the Supreme Court, then to decisions of the Sixth Circuit and other courts within the circuit, and then to decisions of other circuits. See Comstock v. McCrary, 273 F.3d 693, 702 (6th Cir. 2001). In addition, where the issue turns on whether an arrest for a state law offense was made without probable cause, reference to the language of the statute governing the offense, and to state court cases shedding light on the contours of the said offense, is also a requisite. See, e.g, Estate of Dietrich v. Burrows, 167 F.3d 1007, 1010-12 (6th Cir. 1999).[11] To find that the right claimed by Lyons is "clearly

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[11] Whereas other constitutional questions typical to § 1983 litigation, such as, for example, those concerning excessive force, due process, and equal protection, require no reference to state law, a question concerning probable cause does. Barring constitutional infirmities, federal courts must construe state statutes in conformity with how they are interpreted by the state's highest

established," it is not necessary for the Court to find that it has been recognized only in cases that are on all fours with the facts of the case at bar, but it does require a determination that the relevant cases are close enough on their facts to have made the unlawfulness of Officer Keith's and Officer Foubert's actions apparent in this instance. See id. at 1012.

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court. See Garner v. Louisiana, 368 U.S. 157, 166, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961). For identical reasons, determining whether probable cause existed requires an interpretation of the state statute on which the arrest was based. For example, in Estate of Dietrich, where the § 1983 plaintiff had been arrested for violating Ohio's concealed weapons law, the Sixth Circuit looked to that law, Ohio Rev. Code § 2923.12(A), in making its determination as to whether the district court properly found that issues of fact existed on the question whether the police (the § 1983 defendants) had probable cause to arrest the plaintiffs. 167 F.3d at 1011. Likewise, under its qualified immunity analysis, while noting that it is usually the Supreme Court's or its own precedents which govern whether a right is clearly established, it addressed that issue by turning, once again, to the language of the state statute. Id. at 1012. The "clearly established" law, it held, was that "probable cause determinations involve an examination of all facts and circumstances within an officer's knowledge at the time of an arrest," id. (citing Carroll v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543 (1925)) (emphasis in original). Ultimately, whether the § 1983 plaintiff's right to be free from arrest not supported by probable cause was clearly established, under the facts of that case, turned, as did the Fourth Amendment probable cause analysis, on the construction of the state law. This makes sense when one considers that probable cause determinations are the bastion of criminal law, which in the context of state statutes are within the exclusive subject matter jurisdiction of the state courts. Thus, it will always be the state courts which make such determinations, and the decisions of those courts, not the federal courts, with which officers will be familiar.

With respect to Officer Keith, the Court has already found that genuine issues of material fact exist as to whether she had probable cause to arrest Lyons for obstructing official business, assault, and resisting arrest. While it is clearly established that one has the right to be free from arrest not supported by probable cause, the more narrowly focused question for purposes of qualified immunity is whether Officer Keith reasonably could have believed that Lyons had committed any of the offenses for which she was arrested, even if the trier of fact were to find in hindsight that she did not. The implication of this question touches on what the Supreme Court said in Anderson: genuine issues of material fact may exist such that the trier of fact could find, as a matter of fact, that the officer acted unreasonably within the context of the probable cause analysis, while the Court may find, preemptively and as a matter of law, that, though possibly unreasonable under the Fourth Amendment, the actions were not so unreasonable as to impose liability, given that the law surrounding such facts was not clearly established as of the time of the incident. 483 U.S. at 641; see also Hunter, 502 U.S. at 228-29; Saucier, 533 U.S. at 205-06.

The relevant questions in the qualified immunity context are the same as those asked in the probable cause context, subject to the added dimension that they must be analyzed in light of the law as it would have been understood by a reasonable officer in Officer Keith's position at the time of Lyons' arrest. See Saucier, 533 U.S. at 205. Therefore, viewing the facts in a light most favorable to Lyons, the Court asks: (1) was the right of an individual to be free from arrest for obstructing official business, when the individual committed no affirmative acts of obstruction, but merely delayed in providing information about her daughter to an officer conducting an investigation of her daughter, clearly established by case law at the time of this incident?; (2) was

the right of an individual to be free from arrest for assault, when the individual merely pointed her finger and yelled at an officer, clearly established by case law at the time of this incident?; (3) was the right of an individual to be free from arrest for resisting arrest, when the individual merely snapped her wrist away from an officer and no underlying lawful basis to arrest the individual existed, clearly established by case law at the time of this incident?

Each of these questions presented must be answered in the affirmative. As is apparent from the Court's discussion of probable cause, it is clearly established in the appellate case law of Ohio that an individual cannot be found guilty of obstructing official business merely for delaying in providing information to an investigating officer. Moreover, the law is so clearly settled that reasonable police officers could not possibly disagree over whether probable cause of such a violation existed under the facts as set forth by Lyons, which are presumed as true for purposes of ruling on summary judgment.

Regarding the right to be free from arrest for assault where the only offense has been the pointing of a finger at an officer, aside from the knowledge that the jury in Lyons' criminal case found her not guilty of assault, the Court has been unsuccessful in identifying other cases involving similar facts. The Court believes there is a reason for this: pointing a finger simply has never risen, and does not rise now, to the level of assault; neither does it give rise to probable cause that such an offense has been committed, and reasonable police officers could not rationally disagree on this issue. The Supreme Court has made it clear that official actions do not enjoy the protection of qualified immunity merely because "the very action in question has [not] previously been held unlawful." Anderson, 483 U.S. at 640. What is key is that "in

light of pre-existing law the unlawfulness must be apparent." Id. In this case, the Court finds it apparent that in arresting Lyons for pointing her finger and yelling at her, if that is indeed all that occurred, Officer Keith's actions were unlawful.

There is no suggestion that Lyons actually caused Officer Keith harm of any sort. Thus, the arrest for assault must be supportable by evidence that Officer Keith reasonably apprehended an imminent threat to her physical safety at the moment Lyons pointed at her and she grabbed Lyons' wrist. There is no evidence in the record of any such apprehension.[12] Defendants have simply failed to adduce any facts tending to show that Officer Keith had any grounds for arresting Lyons for assault. Serious First Amendment questions would be raised if the Ohio assault statute were interpreted so that the mere pointing of a finger could be a ground for arrest. Given that Defendants have adduced no evidence that Lyons was

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[12] In their Motion, Defendants state that Lyons' behavior in the kitchen was "threatening," that "officer safety at this point was a serious concern," and that Officer Foubert perceived that Officer Keith "was in trouble by the tone in her voice." Defendants have submitted absolutely no evidence supporting a finding that Lyons' behavior was threatening or that Officer Keith's safety was in jeopardy. As for Officer Foubert's perceptions, he stated in his deposition that he detected a "distressed tone" in Officer Keith's call for backup. (Foubert Depo. at 12.) This evidence is unconvincing for two reasons. First, Officer Keith did not radio for backup until after she had grabbed Lyons' wrist and attempted an arrest, and after Lyons had retreated to another room in her house. (Lyons Depo. at 189-92.) Thus, Officer Foubert could not have perceived Officer Keith's state of mind at the relevant time in question. Second, Officer Foubert's testimony, while admissible evidence of his own state of mind, is not admissible as evidence of Officer Keith's state of mind. See Fed. R. Evid. 701.

provoking Officer Keith into combat, it is to be remarked that "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Houston v. Hill, 482 U.S. 451, 462-63, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (finding verbal protestations, where not obscene or in the nature of "fighting words," to be protected by the First Amendment). The act of pointing a finger is nothing more than any other non-threatening hand gesticulation that typically accompanies heated conversation or yelling. Citizens have a basic right to argue with the police, and it simply cannot be maintained that in a society devoted to the preservation of the freedom of expression and protest in public parks and streets and sidewalks, so long as the general peace is not disturbed, see United States v. Grace, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983), a woman does not have the right to express herself freely and non-violently in her own home. The right to do so is clearly established.[13]

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[13] If the law were otherwise, there would be no protection from police abuse of authority. Every reflexive act of pointing a finger, or some other gesticulation, in protest of police tactics, would give rise to an assault charge. If that were the case, and if, in addition, every wise crack or sarcastic comment that did not immediately answer a question posed, or every verbal protestation, or every momentary silence in the face of an officer's query, no matter how reasonable, could be taken as grounds for arrest for obstructing official business, an individual's inherent right to criticize official action would effectually be silenced. Even if such charges were typically dismissed, if an officer could readily invoke qualified immunity, and thus escape liability, he would be far less likely to hesitate in making such arrests. The ultimate chilling effect on speech and protest, even in one's own home, is evident.

Construing the facts and all reasonable inferences in a light most favorable to Lyons, the Court finds that a reasonable officer in Officer Keith's position could not have had probable cause to believe Lyons had assaulted her.

Finally, because a resisting arrest charge is only warranted where the underlying arrest is lawful, and because simply delaying in giving information to an investigating police officer and pointing a finger at her do not constitute grounds for a lawful arrest (on the charges for which Lyons was arrested), resisting arrest, even if actionable resistance could be proved, does not provide an additional ground for arrest. Construing the facts and all reasonable inferences in a light most favorable to Lyons, the Court finds that a reasonable officer in Officer Keith's position could not have believed she had probable cause to arrest Lyons for resisting arrest.

Having closely scrutinized the facts of this case in light of existing, relevant case law, as the Court must do pursuant to Anderson, Hunter and Saucier, the Court finds that genuine issues of fact exist that go to the heart of not only the probable cause issue but also the qualified immunity issue. Accordingly, the Court cannot at this time say that Officer Keith enjoys qualified immunity from § 1983 liability. See Brandenburg v. Cureton, 882 F.2d 211, 215-16 (6th Cir.

Context is very important to a qualified immunity analysis. In the case at bar, viewing the facts in a light most favorable to Lyons, it simply cannot be said that Officer Keith found herself in a novel situation, involving fuzzy questions of law, having to make split-second decisions concerning her own physical safety, or the safety of others. No matter of urgency necessitated the events which ultimately unfolded. Indeed, when the facts are viewed in this light, all she needed to do was allow Lyons to take her medication and then explain the underlying basis for her visit.

1989) (holding that although the "court ultimately decides the law to be applied," where the legal question of immunity "is completely dependent upon which view of the facts is accepted," the case must go to the jury).

With respect to Officer Foubert, evidence of excessively forceful handcuffing precludes protection by qualified immunity at the summary judgment stage of litigation, as the right to be free from such is clearly established. See Martin, 106 F.3d at 1313. It is likewise clearly established that an individual, standing in her own home and not provoking a physical altercation, has the right to be free from being tackled forcefully by a police officer. As such, at this stage, Officer Foubert, as well, may not take shelter under the qualified immunity doctrine. Because there is a genuine issue of material fact as to whether Officer Foubert used excessive force, the Court does not find at this juncture that Officer Foubert is entitled to qualified immunity.

Accordingly, as it relates to their defense of qualified immunity, Defendants' Motion for Summary Judgment is OVERRULED.

IV. Conclusion

Based on the reasoning and citation to authority as set forth above, the Court hereby SUSTAINS in part and OVERRULES in part Defendants' Motion for Summary Judgment (Doc. # 27), as follows: the Motion is SUSTAINED as to (1) all claims against the City of Xenia, Chief Prindle, and those arising under state law, (2) any claim against Officer Keith arising under an allegation of use of excessive force, and (3) any claim against Officer Foubert arising under an allegation of arrest without probable cause; the Motion is OVERRULED with respect to (1) the claim against Officer

Keith for arrest without probable cause, and (2) the claim against Officer Foubert for use of excessive force. Furthermore, when the facts, and reasonable inferences that can be drawn therefrom, are viewed in a light most favorable to Lyons, the Court is unable to hold that Officers Keith and Foubert are entitled to qualified immunity.

Counsel listed below will take note that a telephone conference call will be held at 8:50 a.m., on Tuesday, February 4, 2003, for the purpose of setting a trial date and other dates leading to a resolution of this litigation.

January 22, 2003

/s/
WALTER HERBERT RICE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

(3)

No. 03-1622

Supreme Court, U.S.
FILED
SEP 30 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MATTHEW FOUBERT, Officer,

Petitioner,

v.

CHERYL D. LYONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent Cheryl Lyons submits this Opposition Brief in response to the Petition for a Writ of Certiorari filed by Petitioner Matthew Foubert.

None of the constitutional claims that Petitioner seeks to raise before this Court merit plenary review. Petitioner's principle complaints are that the Sixth Circuit did not look to the "totality of the circumstances" when determining that Officer Fouberts' actions did not merit qualified immunity and the Sixth Circuit did not rely on legal precedent in determining that a reasonable police officer would have had notice that his actions violated clearly established law.

STATEMENT OF THE CASE

On August 18, 1998, Officer Christine Keith of the City of Xenia, Ohio Police Department was investigating an alleged assault by a juvenile named Aiesha Ward. *Lyons v. City of Xenia*, 90 Fed. Appx. 835, 837 (6th Cir. 2004). The investigation culminated in Officer Keith and the Respondent Cheryl Lyons, the mother of the juvenile engaged in a confrontation in the dining room of Respondent's house. (Lyons Depo. at 190.) Officer Keith radioed for backup and Officer Foubert came charging into Lyons' house and immediately tackled her to the floor. (Id. at 192.) At the time of the incident the Respondent was forty-three years old, approximately five feet, four inches in height and weighed between 175 and 180 pounds. (Lyons Depo. at 175.) Officer Foubert, by comparison, was approximately five feet, eleven inches tall, and weighed between 230 and 240 pounds. (Fourbert Depo. at 8.)

The District Court denied summary judgment relief for Officer Foubert on his qualified immunity defense to Respondent's excessive force claim. The Sixth Circuit Court of Appeals held that there exists a general issue of material fact that Officer Matthew Foubert used excessive force when he tackled the Respondent to the floor after merely observing her and Officer Christine Keith engaged in a verbal argument. In applying summary judgment principles the District Court correctly held that the differing versions presented by Foubert and Lyons were genuine issues of material facts, which should be decided by a fact-finder and not on a motion for summary judgment.

Officer Foubert argues that he is entitled to qualified immunity from Ms. Lyons' Fourth Amendment claim. Under this Court's two-step analysis articulated in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) the Sixth Circuit held that the Fourth Amendment prohibits excessive force by police in the course of apprehending suspected criminals. *See Graham v. Connor*, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In the case sub judice the Sixth Circuit majority held that a constitutional right had been violated. In the second tier of analysis of the *Saucier* test the court held that the right violated was clearly established in that an objective reasonable officer would have known that it was unlawful to tackle and forcefully subdue the plaintiff given the totality of the circumstances. Ms. Lyons, giving deference to her version of the facts, was not in physical contact with Officer Keith she was not trying to assault or commit physical harm to Officer Keith's person. Neither was she attempting to flee the scene and she was not in possession of a weapon. Admittedly, there was a verbal altercation and Officer

Foubert was responding to a call for assistance. That call did not indicate the presence of a weapon or the threat of assault. When Officer Foubert entered the room Ms. Lyons and Officer Keith were both standing and were not in physical contact. The Sixth Circuit held that given these factors it was objectively unreasonable for Officer Foubert to tackle Ms. Lyons and place his weight on her in a manner that stopped her breathing. Not only were his actions objectively unreasonable, but he had fair notice that they were unreasonable; therefore, he was denied the affirmative defense of qualified immunity.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED.

A. The Sixth Circuit Court correctly applied the "Totality of the Circumstances" test.

The decision below does not conflict with a decision of the United State Supreme Court, and should not conflict with any Court of Appeals in light of the landmark decision in *Hope v. Pelzer*, 536 U.S. 730, 177 S.Ct 2508, 153 L.Ed.2d 666 (2002). This Court's decision in *Hope*, establishes the proper analysis of qualified immunity, and the Sixth Circuit followed its precedent in this case and other circuits have followed it. *Treats v. Morgan*, 308 F.3d 868, 874-75 (8th Cir. 2002); *Hawkins v. Holloway,* 316 F.3d 777, 788 (8th Cir. 2003); *Savard v. Rhode Island,* 320 F.3d 2003 (1st Cir. 2003). In *Vaughn v. Cox*, 316 F.3d 1210 (11th Cir. 2003), cert. denied, 123 S.Ct. 2252 (2003) an interesting anomaly exists following a decision in which the Eleventh Circuit on remand after *Hope* granted summary judgment based on Petitoner's qualified immunity defense and later

reversed itself without explanation. *See Vaughn v. Cox*, No. 00-14380, 2003 U.S. App. LEXIS 18066 (2003). Moreover, the analysis of qualified immunity by all United States Circuit Courts of Appeal must follow this Court's decision in *Hope*. Therefore, the issues raised by the Petitioner and Amici do not merit plenary review. The analysis of qualified immunity and the Sixth Circuit's decision to deny this immunity to Officer Foubert in the case at bar is consistent with this Court's decision in *Hope*. Furthermore the decision in *Hope* eliminates any meaningful conflict with other Circuit Courts of Appeal.

In an effort to construct a conflict among the circuits, where none exists, Petitioner avers that the Sixth Circuit did not properly apply the "totality of the circumstances" test. They pose an illusory, compartmentalized or segmented analysis in contrast with a holistic or an all-encompassing weighing of the various facts to determine both whether a constitutional violation has occurred and whether an officer's actions merit qualified immunity. Simply put the Sixth Circuit looked to the totality of the circumstances in reaching its decision. In the case at bar the trial court and the Sixth Circuit did not ignore the factors which occurred before the alleged tackling by Officer Foubert. Judge Julia Smith Gibbons, writing for the majority noted the undisputed facts that:

> "Officer Keith and Lyons were yelling at each other and "[i]t got loud." Officer Keith called for backup. Officer Foubert received the call for backup. When he received the call, Officer Foubert heard "muffled noises in the background." Officer Foubert answered Officer Keith's call for backup and ran into Lyons's house. Then, Officer Foubert used force to restrain Lyons."

Judge Gibbons then looked at the divergent accounts of facts and concluded that under Lyons account of what occurred Officer Foubert violated Ms. Lyons' constitutional right against excessive force. Citing Sixth Circuit precedent Judge Gibbons held that the denial of summary judgment in an interlocutory appeal was appropriate. *See Buckner v. Kilgore*, 36 F.3d 536 (6th Cir. 1994), *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994) and *Sova v. City of Mount Pleasant*, 142 F.3d 898 (6th Cir. 1998). Ms. Lyons account of the arrest was that at the time of the tackling she did not have any physical contact with Keith, and they were standing facing each other in an upright position when Officer Foubert rushed to her lifted her up in the air and threw her to the floor. Aeisha Ward, Ms. Lyons minor daughter who was present at the time of the arrest, characterized Officer Foubert's actions as "a football player tackle in which Officer Foubert used all of his strength". Judge Gibbons also took note of the accusations that once he tackled her to the floor Officer Foubert forced Ms. Lyons down to the floor placing his body on top of her in such a forceful manner that she had trouble breathing before throwing her to her right side and handcuffing her. In essence this was no mere tackling case. Both Judge Gibbons and Judge Tarnow, in his concurrence, correctly and thoroughly looked at the totality of the circumstances in finding the fact that Officer Foubert received a call for assistance and was responding to that call did not outweigh the other abovementioned facts under Lyons' version of the events. The Sixth Circuit held that given the totality of all the facts of the Lyons version a reasonable officer would know that it was a clear violation of established law to tackle a person he merely observes in a verbal confrontation with a fellow officer.

Judge Gibbons opined that a reasonable officer would [based on mere observation of Officer Keith and Lyons engaged in a verbal confrontation] know that tackling a person from a standing position to the floor then lying on top of them with his full weight such that it takes their breath, is a violation of clearly established law and such knowledge prevents the award of qualified immunity.

Officer Foubert did not have facts that Lyons was possibly armed or posed a danger of having a weapon. The initial investigation, which caused Officer Keith to enter the Lyons home, was an alleged assault committed by juveniles. The crime that Lyons was charged with was not a serious crime. Petitioner is incorrect when he asserts that Judge Gibbons, and the majority, only took into account the single fact that Officer Foubert saw Lyons and Officer Keith standing and having a verbal altercation. The Petitioner does not address the fact that the majority decision also noted that Lyons' version of the facts consisted of more than mere tackling.

Judge Gibbons and Judge Tarnow weighed all of the aforementioned facts; they did not base their decision solely on the fact that Foubert did not see Keith and Lyons in a physical altercation. The majority held that under the totality of the circumstances Officer Foubert was not entitled to qualified immunity.

II. THE SIXTH CIRCUIT ARTICULATED LEGAL AUTHORITY IN *HOPE V. PELZER* SUFFICIENT TO DENY OFFICER FOUBERT QUALIFIED IMMUNITY.

The Petitioners and Amici's arguments that the majority erred in not relying on prior cases on all fours with the case sub judice's alleged constitutional violation, is erroneous. In *Hope* this Court specifically stated that it was error for the Eleventh Circuit to require that the facts of previous cases and the case at bar must be materially similar. This Court placed the focus of scrutiny on insuring that officers are on notice that their conduct violates citizens' constitutional or statutory rights. Following this court's decision in *Hope* government officials must look not only to the qualified immunity case law but also to the reasoning of the cases when determining the constitutionality of their conduct, and precedent cases do not have to be fundamentally similar to the case at issue but only needs to give fair warning to the government official(s) that their conduct crosses the line.

Judge Gibbons opined that Officer Foubert had fair warning that his actions violated the Fourth Amendment's prohibition against excessive force. Judge Gibbons cited *Martin v. Heideman*, 106 F.3d 1308 (6th Cir. 1997), and reasoned that an officer could reason that if overly tight handcuffs could constitute excessive force then tackling could constitute excessive force as well. Moreover, she does not limit her inquiry to tackling alone, but also focuses her attention on his acts following the tackling. Again, Petitioner and Amici do not address the fact that this is not just an incident of tackling but is followed by other acts, which a reasonable police officer would know were excessive given the totality of the

circumstances. This particular set of facts as acknowledged by the majority and the minority present a "novel" situation in the Sixth Circuit. The Sixth Circuit's majority decision followed the precedent set in *Hope* when it reasoned that the novelty of an excessive force claim cannot be a shield when the act has not been specifically declared unlawful. "An officer cannot claim entitlement to qualified immunity merely because the very act for which he is challenged has not previously been declared unlawful. *Dickerson v. McClellan*, 101 F.3d at 1151, 1158 (6th Cir. 1996); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987)." Justice Gibbons quoted from *Saucier v. Katz*, 533 U.S. 194 at 205 (2001) in noting that excessive force claims arise from virtually "limitless factual circumstances." A reasonable police officer should know that tackling an individual he merely observes in a verbal argument with another officer is unconstitutional.

Judge Sutton cited *Santos v. Gates*, 287 F.3d 846 (9th Cir. 2002), and *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), as specific case law in which the mere act of tackling has been held to constitute excessive force. In distinguishing these cases from the holding in *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002), which was submitted as precedent by Judge Sutton, the majority noted that in *Smith* the plaintiff was engaged in physical contact with police officers, while in the case at bar under Lyons version Officer Keith and Lyons were not in physical contact when Foubert observed them prior to tackling her.

III. THE COURT SHOULD NOT USE THIS CASE TO CREATE AN EXCEPTION TO THE CONSTITUTIONAL-QUESTION-FIRST RULE

Petitioner asks this court for a Writ of Certiorari to create an exception to or limit the constitutional-question-first rule. This rule was articulated in *Saucier*, 533 U.S. at 194. In the case at bar the Petitioner asserts that by ruling that Foubert's actions violated Ms. Lyons right to be free from excessive force, and by doing so in the Sixth Circuit they have declared it unconstitutional for any police officer to tackle a person similar to the facts in *Lyons v. Xenia*, supra.

"The elementary justification for the doctrine is that public officials performing discretionary functions should be free to act without fear of retributive suits for damages except when they should have understood that particular conduct was unlawful." *Limone v. Dennis Condon* 372 F.3d 39 (1st Cir. 2004) *citing Davis v. Scherer* 468 U.S. 183, 104 S.Ct. 3012, 83 L.Ed. 2d 139 (1984). The history of qualified immunity in the area of constitutional torts seems to be inextricably bound to the concept that we are attempting to protect police officers who err in the boundaries of what is constitutional in a way that will be the least disincentive to vigorously pursue law enforcement while preserving the protection for citizens who are the victims of egregious police error or misconduct. In *Hope* the court took particular notice of the fact that the best way to maximize the objective of qualified immunity is to provide police officers or governmental officials with "fair notice" of what is constitutional and what is unconstitutional. The first prong of the *Saucier* test in ways clearer that the second prong articulates to the untrained legal mind unconstitutional acts by law enforcement officers and governmental officials.

To eliminate this judge-made rule would militate against the principle of legal precedent giving these individuals fair warning of what is constitutional and what is unconstitutional activity. A failure to follow the strict dictates of the Saucier test has been in some cases not fatal to a decision when the court concluded that a remand would produce the same results. *See Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003). Hence, the court should not eliminate the first prong of the *Saucier* test. The Writ of Certiorari requested by the Petitioner should be denied.

CONCLUSION

In sum, this Court held that established law must give fair warning to officials that their conduct is unconstitutional. That fair warning can be established by cases, which do not have facts, that are materially similar to the situation in which the individual officer finds himself. Plenary review being unwarranted, the Petition for Certiorari should be denied.

Dated: September 30, 2004

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No. 03-1622

In the Supreme Court of the United States

MATTHEW FOUBERT, Officer,
Petitioner,

v.

CHERYL D. LYONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REVIEW OF THE QUESTIONS PRESENTED

1. When some undisputed facts in the record support an officer's inference that a suspect posed a risk of harm to a fellow officer, does the qualified immunity doctrine of *Saucier v. Katz*, 533 U.S. 194 (2001) permit a court to deny qualified immunity: (a) based not on the totality of the circumstances known to the officer but, instead, solely on the visible circumstances at the time he used force; (b) based on cases whose fact patterns under *Saucier* are "distinguishable in a fair way" from this case; and (c) based on case law decided after the incident at issue?

2. Should this Court, in a case alleging the use of constitutionally excessive force, create an exception to or limit the precedential effect of the "constitutional-question-first" rule, recently addressed in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), when such rule operates to create "clearly established" law and the declared law in turn operates under *Saucier* to generally overcome the qualified immunity of police officers making similar split-second decisions?

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REPLY BRIEF FOR PETITIONER

Upon interlocutory appeal to the Sixth Circuit Court of Appeals, petitioner Officer Matthew Foubert was denied qualified immunity from a Section 1983 claim. Respondent, Cheryl D. Lyons, alleged Officer Foubert used unlawful force when he arrested her on August 18, 1998. To avoid cert, respondent claims the legal issues presented by this appeal are resolved and applied consistently throughout the circuits. As demonstrated by Officer Foubert's petition for certiorari and the following analysis, respondent's argument is without merit and Officer Foubert's petition should be granted.

First, the court should resolve the conflict among the various circuit courts with respect to whether the *Graham* reasonableness analysis should be segmented into specific periods of time, which segmentation acts to exclude the reasonable subjective considerations of police officers on the scene.

Second, the court should take this opportunity to clarify the *Harlow* and *Saucier* qualified immunity analysis as applied after the *Hope* decision. Does *Hope*, as respondent suggests, permit a reviewing court to deny qualified immunity without applicable legal authority or "clearly established" law? Does *Hope* permit a reviewing court to rely solely upon *post facto* case law that is distinguishable in a fair way from the case at hand as did the majority opinion?

Third, the court should take this opportunity to address the constitutional-question-first requirement of the qualified immunity analysis. Rather than mandating a no-exception, two-step qualified immunity analysis, the court should allow for exceptions when such analysis has the potential to create clearly established law, thereby denying qualified immunity for police officers except for only the most frivolous of lawsuits.

A. PETITIONER'S EMERGENCY RESPONSE WAS REASONABLE AS A MATTER OF LAW.

1. Initially, this court should reject the assertion set forth in the Sixth Circuit's majority opinion that qualified immunity must be denied simply because the parties had differing recitations of the facts. *Lyons v. City of Xenia*, 90 Fed.Appx. 835, 847-848 (6TH CIR. 2004), attached at Appendix A to Petitioner's Writ of Certiorari.

Respondent did not dispute the fact that Officer Foubert was responding to an emergency dispatch. *Id.* at 844. Respondent did not dispute the fact that Officer Foubert heard Officer Christine Keith, his partner of two years, yell for help over the radio. *Id.* Officer Keith was in the respondent's house to investigate a violent juvenile assault. *Id.* at 843. Respondent did not dispute the fact that Officer Foubert did not hesitate as he ran into the house to his partner's aid. *Id.* at 844. Respondent does not dispute the fact that police officers should act without hesitation when responding to emergency situations.

Respondent also acknowledges she was standing in front of Officer Keith arguing with her when Officer Foubert ran into the house. *Id.* And, for purposes of summary judgment, Officer Foubert accepted that fact as true. Respondent concedes that she physically outmatched Officer Keith by a significant margin. *Id.* Therefore, from his perspective, Officer Foubert saw a large, unidentifiable individual inches from his partner and arguing with her as he ran into the house in response to the distress call. *Id.*

Officer Foubert also accepted for purposes of summary judgment that he "tackled" the respondent, though he did note that the proper police terminology is "balance displacement technique." *Id.* at 844-845. In addition, for purposes of

summary judgment, Officer Foubert accepted the fact that he "threw" the respondent onto her side and handcuffed her. *Id.*

The respondent does not dispute the fact that she was not seriously injured in the course of her arrest. *Id.*

Because Officer Foubert moved for qualified immunity based upon the facts in a light most favorable to the respondent, the Sixth Circuit had an obligation to evaluate the motion in the same manner without relying upon alternative facts Officer Foubert testified to in his deposition. *See Scott v. Clay County, Tenn.*, 205 F.3d 867, 877 (6th Cir. 2000).

2. Police officers must necessarily use some amount of force in the course of a lawful seizure or arrest. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In determining whether Officer Foubert was entitled to qualified immunity for the above-recited use of force, the Sixth Circuit first had to question whether Officer Foubert's actions were objectively unreasonable. *Graham v. Connor*, 490 U.S. 386, 392, 109 S.Ct. 1865, 104 L.Ed.2d 32 (1989). In making this determination, the Sixth Circuit presumably made "allowance for the fact that police officers are often forced to make split second judgments--in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97.

3. This case, however, appears to be further complicated by a split amongst the circuit courts in how to apply the reasonableness analysis. The split is between those circuits that segment the reasonableness analysis, [1] and those circuits that do not.[2] Courts using a segmented analysis to determine

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[1] *See, e.g., Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996); *Bella v. Chamberlain*, 24 F.3d 1251, 1256 (10th Cir. 1994); and *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993).

[2] *See, e.g., Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994); *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999); *Deering v. Reich*, 183 F.3d 645 (7th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct. 532, 145 L.Ed.2d 412 (1999); and *Hegarty v. Somerset*

the reasonableness of a public official's actions, "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." *See, Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), quoting *Plakas v. Drinksi*, 19 F.3d 1143 (7th Cir.), *cert denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 34 (1994).

In the context of police liability, the Sixth Circuit has expressly adopted the segmented application of the *Graham* objective reasonableness test. *Dickerson*, 101 F.3d at 1162. The court limited the "totality of the circumstances" to the facts as they are alleged to have occurred in the moments immediately preceding the use of force. *Id.*

4. Respondent does not argue in favor of the segmented approach to these decisions. Rather, she argues the Sixth Circuit Court of Appeals did not apply a segmented analysis in this case. Respondent points to the majority's discussion of the police dispatch and other facts of the case. This argument is without merit. The court's discussion of all the facts of the case is not sufficient to overcome the presumption that the majority applied its own precedent and the segmented analysis consistently. *See Dickerson*, 101 F.3d at 1162. In fact, justification for the majority's decision can only be found through a strict application of the *Dickerson* segmented analysis.

A reasonable police officer in petitioner's position would have believed his partner was in danger when he heard the undisputed police dispatch and radio calls. Petitioner also had knowledge that Officer Keith was investigating a violent crime. If the majority applied a non-segmented analysis, one must conclude that the dispatch and potential for violence inside an unfamiliar environment were wholly negated in the mere seconds between the time Officer Foubert ran into the house and the use of force.

County, 53 F.3d 1367 (1st Cir. 1995).

By applying a segmented analysis, the majority carved Officer Foubert's initial knowledge and considerations of the emergency situation from the knowledge and subjective considerations he gained after he crossed the threshold of the home. The majority specifically said, "[w]hether Officer Foubert's determination about the law was mistaken or unreasonable still depends upon what the circumstances were *at the time* he used force against Lyons." App. to Petition, 25a. The majority acknowledged, "Officer Foubert's actions would be objectively reasonable if, under the circumstances known to Officer Foubert at the time he used force, a reasonable officer would perceive that Officer Keith's safety was in jeopardy and that force was necessary to secure her safety," but held there was no reason for Officer Foubert to believe Officer Keith's was in danger. *Id.* By not seeing Officer Keith and respondent in a physical altercation the second he ran into the house, Officer Foubert had no reason to believe force was necessary. *Id.* It is just this type of second-guessing by the courts that should be absent from the qualified immunity analysis. *Graham*, 490 U.S. at 397.

It is petitioner's position that the court should not segment any of the subjective considerations a reasonable police officer would have had in these circumstances. Officer Foubert had no specific knowledge about the type of emergency that led to the frantic calls for help and dispatch to the scene. Yet, he responded without hesitation, running into the house to his partner's aid.

Officer Foubert could not overrule a threat to Officer Keith's safety or a threat to his own safety. He could not know the number of occupants of the house, their mental conditions or the potential for ambush or use of weapons. Contrary to the respondent's assertion, the lack of information on each of these and other unknown variables should not lead simply to a conclusion that no force was required in the circumstances.

With all of the possibilities in his mind as he responded to the emergency, there is no doubt Officer Foubert responded reasonably just as Judge Sutton's dissenting opinion explained. *Lyons*, 90 Fed.Appx. at 844.

Rather than segmenting the reasonableness analysis, the court had an obligation to consider all of the facts known and unknown to Officer Foubert. Therefore, this Court should accept review of this case to determine whether and when a segmented reasonableness analysis should be applied to Fourth Amendment claims and whether Officer Foubert's actions were reasonable as a matter of law.

B. CLARIFYING THE SECOND STEP OF THE QUALIFIED IMMUNITY ANALYSIS.

1. Police officers have a constitutional obligation to perform their official duties in a reasonable manner, including the use of force to make a lawful seizure or arrest. *Graham*, 490 U.S. at 394-95. Reasonableness, however, is a highly factual inquiry generally left to the determination of the court or jury. *See Santos v. Gates,* 287 F.3d 846, 855 (9th Cir. 2002). As a practical matter, however, a jury of twelve laypersons cannot be subjected to the same pressures and stress to which the police officer acting in an emergency was subjected. Moreover, the law surrounding the reasonableness of the use of force in any given circumstance is constantly evolving. What was reasonable 10 years ago may not be reasonable today. And, in light of 9/11, what is reasonable today may not have been reasonable 10 years ago.

Police officers and other public officials should not be held civilly and personally liable for reasonable mistakes of judgment or reasonable mistakes in determining what actions are constitutionally or legally permissible in a given circumstance. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The doctrine of

qualified immunity serves to protect public officials from individual liability when the law surrounding an official act is not clearly established such that any reasonable official would have known his or her actions were a violation of the Constitution. *Id. See also, Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

Qualified immunity is recognized as more than a defense to personal liability for damages. *See Saucier,* 533 U.S. at 199. Qualified immunity encourages police officers to act without hesitation when confronted with an emergency that requires a quick and decisive response.

The well recognized steps of the immunity analysis first require the court to determine whether the facts as alleged constitute a constitutional or statutory violation. *Id.* As discussed above, there was no constitutional violation in this case. But, even if the court could have legitimately found that there was a question of fact on this issue, it must determine whether the law surrounding the alleged constitutional violation was clearly established. *Id.*

2. In this appeal, the court is faced with a decision by the Sixth Circuit Court of Appeals that was actually split on the question of whether petitioner's use of force was constitutionally reasonable. Yet, the majority of that panel decided that the law was clearly established - that the use of force in those circumstances was a clear violation of the Constitution. Therefore, while the law was so ambiguous that the court itself could not agree on whether the particular use of force was reasonable, the majority still decided petitioner should have been able to sort through the law and make a conscious decision on its application.

The court did not rely upon any legal authority that governed **at the time** of the petitioner's use of force. Nor, did it rely upon any legal authority that could not be distinguished in a fair way from the case at bar, just as Judge Sutton explained in his dissenting opinion. *Id.* at 845.

3. Respondent argues the majority could have went one step further and found that the law was clearly established under the qualified immunity analysis without relying upon any legal authority. Brief in Opposition, p. 7. In doing so, respondent re-characterizes this court's decision in *Hope v. Pelzer,* 536 U.S. 730, 739-40, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

First, neither the respondent nor the lower courts discussed the *Hope* decision below.

Second, *Hope* does not obviate the need to have clearly established law surrounding the alleged constitutional violation before a public official can be held personally liable for violations thereof. Rather, *Hope* clarified and, in some circumstances, expanded what law could be looked at to determine whether a particular right was clearly established in the context of qualified immunity.

Respondent relies upon the rule in *Hope* that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 740. This is similar to the rule the court of appeals relied upon denying public officials qualified immunity even when the very act for which he is challenged has not previously been declared unlawful. *Lyons,* 90 Fed.Appx. at 849.

The decision in *Hope* simply acknowledged that every use of force will be different, but that does not mean that a police officer did not have "reasonable warning" that his actions were illegal. For instance, in *Hope*, the eleventh Circuit had determined that even though prison guards had violated an inmates constitutional rights by handcuffing him to a hitching post for seven hours without a shirt, water, or bathroom breaks, they were still entitled to qualified immunity because no case had previously addressed that set of facts.

This court said that, while the facts were not "fundamentally similar" to governing case law, cases from both

the Fifth and Eleventh Circuit and an Alabama Department of Corrections regulation gave the prison guards "reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 740. This legal authority clearly rejected the ability of prison guards to tie inmates to fences and the like for punishment. *Id.* It is clear that if a reasonable officer knew that he could not constitutionally tie an inmate to a fence for punishment, then he could not constitutionally handcuff an inmate to a hitching post for punishment.

Unlike this court in *Hope*, the Sixth Circuit nor the respondent relied upon any legal authority that would have given the petitioner reasonable warning that it was unconstitutional to "tackle" a suspect under these particular circumstances. The court only relied upon case law rendered after the alleged incident. Additionally, it is clear that those decisions were factually distinguishable in a fair way from the case at bar. In neither of the cases relied upon by the majority did the plaintiff pose any threat to any officer. *See Santos v. Gates*, 287 F.3d 846 (9th Cir.2002)(gratuitous force used on passive individual) and *Meredith v. Erath*, 342 F.3d 1057 (9th Cir.2003)(female arguing with one of twelve present IRS agents).

Because the court could not even agree amongst itself whether Officer Foubert's actions were constitutionally unreasonable and because neither the court nor the respondent pointed to any governing legal authority that would have given Officer Foubert fair warning of the potential illegality of his actions, this Court must overturn the decision of the lower courts and grant Officer Foubert qualified immunity.

C. STRICT APPLICATION OF THE CONSTITUTIONAL-QUESTION-FIRST REQUIREMENT.

Petitioner recognizes the importance of the first step of the qualified immunity for the continued elaboration of constitutional law. However, as this court recognized in *Bunting v. Mellen*, 124 S.Ct. 1750 (2004), the strict application of the constitutional-question-first requirement in cases such as this one will ultimately result in scenarios where police officers will be unwilling to act for fear of civil liability.

For instance, in denying petitioner qualified immunity in this case, the lower courts were forced to make an express determination that Officer Foubert's conduct was constitutionally unreasonable when it would have been more sensible for them to skip to the second step of the analysis and find there was no clearly established precedent. Now, however, the majority's decision has the import of creating "clearly established" law that will either negate qualified immunity for officers facing similar emergencies or simply stop those officers from responding quickly based upon a growing fear of liability.

Thus, the court should accept this case for review to address the constitutional-question-first requirement of the qualified immunity analysis to determine whether certain exceptions to that requirement should be made.

CONCLUSION

Based upon the foregoing reasons and those stated in the petition, Officer Foubert's petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-1622

In The Supreme Court Of The United States

MATTHEW FOUBERT,

Petitioner,

v.

CHERYL D. LYONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 11 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF AMICI INTEREST

This case concerns the scope of police-officer immunity in those situations in which the officer responds to a fellow officer's emergency call for assistance and, on arriving at the scene, uses force to subdue a suspect. More broadly, this case implicates how qualified immunity is evaluated as a general matter in excessive force cases. Here, a majority of the Sixth Circuit panel below denied Officer Foubert qualified immunity without even considering whether existing case law addressed the force he applied *in the context of receiving an emergency call for assistance from a fellow officer*. The deeply flawed approach of the lower court reflects an increasingly frequent error of the appellate courts concerning the particularity of facts in existing case law that would suffice to give an officer "fair warning" that his conduct may later be found to constitute excessive force.

Ohio and eleven other *amici* States, as guardians of public order within their respective jurisdictions, share an inherent interest in this issue. How courts evaluate claims of qualified immunity in excessive force cases will inevitably influence how effectively officers can investigate crime and preserve public order. On one hand, officer immunity is "qualified" rather than "absolute" precisely so that citizens can vindicate their legitimate right to be free of excessive force. This limit to immunity gives officers a proper incentive to respect a suspect's personal security. But on the other hand, if lower courts fail to apply with rigor the qualified immunity standards articulated by this Court, then the threat of litigation will chill a wide range of legitimate law-enforcement activity.

This case is a trenchant example. Officers who receive an emergency call from a fellow officer ought to be justified in expecting that the emergency circumstance will receive prominent attention when a court later considers

whether the officer is entitled to qualified immunity. Yet Officer Foubert was stripped of qualified immunity in this case without any reference to case law that could reasonably put Foubert on notice that any mistake he made in applying force somehow constituted an unreasonable mistake, given that he was responding to an emergency call for assistance from a fellow officer.

In *Saucier v. Katz*, 533 U.S. 194, 204 (2001), this Court specifically held that "[t]he inquiries for qualified immunity and excessive force remain distinct, even after *Graham* [*v. Connor*]." But the denial of qualified immunity in this case involved little more than repeating the basic finding that, on one version of the facts, Officer Foubert's actions were unreasonable. Moreover, the denial of qualified immunity in this case exemplifies a general and recurrent problem that is rooted in the misapplication of the standards for determining "clearly established law." To correct this erosion of an important principle of federal law, this Court should grant certiorari and reverse.

SUMMARY OF ARGUMENT

Ohio and the amici states urge the Court to grant certiorari on the first question presented. The States take no position on the second question in the petition, and we do not address it in this brief.

The first of the two questions presented merits a grant of certiorari because the decision below does not constitute an isolated error, but instead exemplifies a growing confusion of the lower courts in evaluating qualified immunity in excessive force cases. *Saucier v. Katz*, 533 U.S. 194 (2001) established that, when an officer asserts immunity, the courts must assess the immunity in two sequential steps. First, courts should decide whether a constitutional right would have been violated on the facts

alleged. If the answer is yes, courts must then proceed to decide whether that right was clearly established at the time of the incident. We will refer in this brief to the first step as the court's determining the existence of "constitutional violation" or "excessive force." We will refer to the second step as determining whether "clearly established law" put the officer on notice that his conduct was unlawful. It is the "clearly established law" determination that is at issue here.

Under *Saucier*, courts evaluating the typical excessive force case should find that prior cases meet the "clearly established law" standard only if the facts of those prior cases cannot be "distinguished in a fair way" from the present case. 533 U.S. at 202. The Sixth Circuit majority's decision in this case exemplifies two types of recurrent error in making that determination.

First, courts often fail, as the Sixth Circuit did here, to look for prior cases that address important aspects of the "totality of circumstances" that form the basis for the determination of excessive force. Since the standard for determining whether an officer used excessive force requires considering "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure," *Graham v. Connor*, 490 U.S. 386, 396 (1989), citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), a trier of fact making that determination would be entitled to attach material significance to any of the totality of circumstances in a particular case. It follows that prior cases should be regarded as stating "clearly established" law in the present case only where the totality of circumstances presented in the current case parallel the particular facts of the prior case or cases.

In particular, when the linchpin of excessive force analysis lies, as it does in this case, in the officer's inferring a risk of harm that led to the use of force, courts ought to look

for prior cases where officers inferred a risk of harm under similar circumstances. But the Sixth Circuit failed to do so, and that error has been committed by other courts as well.

Second, courts determining the "clearly established law" issue suffer from the confusion that stems in part from a misapplication of *United States v. Lanier*, 520 U.S. 259 (1997) and, more recently, *Hope v. Pelzer*, 536 U.S. 730 (2002). While it is true that those cases acknowledge some situations where the law may be found to be clearly established even on factually dissimilar cases, that teaching should not control in a fact-specific excessive force case where an officer is summoned to the scene by an emergency call for assistance. Instead, qualified immunity in responding to an emergency call for assistance should only be pierced based on cases that show that an officer's inference of risk of harm to a fellow officer is unreasonable, or that a particular degree of force would be unreasonable given the inference of potential harm to the fellow officer.

REASONS FOR GRANTING THE WRIT

In this case, a fractured Sixth Circuit Court of Appeals[1] stripped Petitioner Officer Foubert of his qualified immunity by undertaking a dubious and confused analysis. As Judge Sutton's dissent pointed out, undisputed facts at the summary judgment stage showed that the force was applied in a context in which Officer Foubert received a "distressed call for backup help from a fellow officer." Then, when Officer Foubert responded to that emergency call, he entered

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[1] The opinion in this case was fractured in that Judge Sutton wrote for the majority on the excessive force claim involving the handcuffing of Respondent, while Judge Gibbons wrote for the majority on the claim involving the tackling (or "balance displacement") of Respondent. This latter claim is the one at issue here. Thus, any reference to the "Sixth Circuit" or the "court below" is to Judge Gibbons's opinion, unless expressly noted otherwise.

the house and "saw [the fellow officer] in close proximity to Lyons [on either version of the facts] and the two of them yelling at each other." Pet. App. 15a. Yet the panel majority denied qualified immunity without considering whether any prior cases put Officer Foubert on notice that he could not justifiably infer a risk of harm given these undisputed facts.

A. The Sixth Circuit's decision exemplifies the improper result of employing a segmented, overly restrictive view of the totality of circumstances when determining whether the exercise of force violated clearly established law.

As outlined in Petitioner's opening brief, the Sixth Circuit's decision below reflects a segmented, overly restrictive approach to applying *Saucier v. Katz*. *See* Pet. Br. at 11-15. *Saucier* prescribed the analysis that courts should use when considering an officer's claim of qualified immunity in an excessive force case, and set forth that analysis in terms of two sequential steps. The Sixth Circuit misstepped on both.

Under *Saucier*, courts should first determine the "threshold question" whether, "taken in the light most favorable to the party asserting the injury," the "facts alleged show the officer's conduct violated a constitutional right." 533 U.S. at 201. In excessive force cases, that inquiry involves judging "the reasonableness of the officer's belief as to the appropriate level of force . . . from [the officer's] on-scene perspective." *Id.* at 205, citing *Graham v. Connor*, 490 U.S. 386 (1989). That inquiry calls for "attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Saucier addressed the question whether the inquiry should end after this threshold question and proceed to a second step. *Saucier* firmly decided the answer was yes. Once a court has determined that a claim of excessive force is present, *Saucier* holds that an officer is stripped of immunity only if the constitutional right that was violated was "clearly established." *Saucier*, 533 U.S. at 201. And, according to *Saucier*, a right is clearly established only upon considering the conduct at issue and comparing it to a prior case finding a constitutional violation with "facts not distinguishable in a fair way" from the case at hand. *Id.* at 202. This standard reflects the underlying requirement that "before [officers] are subjected to suit, [they] are on notice their conduct is unlawful." *Id.* at 206.

In the context of a Fourth Amendment excessive force claim like this case, the constitutionality of the officer's actions is measured by a standard of reasonableness under the totality of the circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (describing the test as "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure"); *see also Graham*, 490 U.S. at 396. It follows that, in any given excessive force case, the judge or jury might determine that some facts in the totality outweigh others in importance; but the totality defines the range and scope of consideration and, for the police officer going about his duties, the totality constitutes his basis for determining how to act in accordance with the Constitution.

In this case, however, the Sixth Circuit majority focused very narrowly on the precise scene Officer Foubert encountered after entering the house, without giving proper attention to the emergency call that led to his presence there. In doing so, the court failed to consider the undisputed facts showing that Foubert inferred a risk of harm based primarily on the emergency call. The Sixth Circuit's restricted view led to the holding that, on the plaintiff's version of the facts,

Officer Foubert acted unreasonably and used excessive force. The same restrictive view led to error when the court considered the issue of clearly established law.

When a court mistakenly focuses on just one segment of the totality of circumstances in determining excessive force, it is not surprising when that same court errs again in the same way in searching for clearly established law, by looking only to cases involving a small subset of all the facts in that totality. That surely occurred in the present case, where both the majority and the dissent sought—largely in vain—prior cases involving the tackling of a suspect at arrest. *See* Pet. App. 17a, 26a.

Yet this error differed from the court's step-one error in that the court's search for clearly established law was both over- and under-inclusive. The court focused too narrowly by looking solely for tackling cases. But more important, the court erred by not limiting its search to cases in which an officer had to decide the appropriate level of force *in responding to an emergency call*. Indeed, the central finding that guided the majority's analysis of reasonableness lay not in the precise nature of the force applied, but in Officer Foubert's inference that a risk of harm to his fellow officer justified *any* physical action to subdue Lyons:

> I disagree that Officer Foubert had cause to be concerned for Officer Keith's safety under Lyons's version of events and, therefore, believe summary judgment for Officer Foubert is inappropriate.

Pet. App. 24a. Given that the majority's excessive force analysis turned on the inference of a risk of harm, the inquiry

into "clearly established law" should have involved finding cases where officers acted on the basis of emergency calls to a remote location.[2]

Nor is the Sixth Circuit is the only court led astray by segmenting the totality of circumstances in which an officer acted. The Second Circuit similarly truncated the "clearly established law" test in *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2nd Cir. 2003). In *Cowan*, Officer Breen became embroiled in difficult circumstances when he legitimately stopped a car after he observed erratic driving. The car was registered to a man with a criminal record. Neither the driver nor his passenger, Cooper, could produce a license. A search of the driver yielded a substance resembling narcotics, at which point the driver bolted and headed for the nearby woods. Officer Breen's pursuit on foot proved fruitless. When he returned to his vehicle, he found that Cooper had meanwhile moved from the passenger seat to the driver's seat, and Cooper was driving in Breen's

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[2] In one case cited below, *Smith v. Ball State University*, 295 F.3d 763 (7th Cir. 2002), an officer at the scene did call for assistance from other officers, but the force was applied by another officer who appeared later on the scene and used force based primarily on what he witnessed at the scene. In any event, the court found qualified immunity in that case. It appears that few cases address the emergency call situation. One case issued after the incident in this case properly takes account, in assessing the reasonableness of an officer's use of deadly force, of information that an officer derived from a 911 call. *Milstead v. Kibler*, 243 F.3d 157, 160, 163 (4th Cir. 2001) (911 caller stated intruder into home had shot man in the neck and stabbed a woman, and those facts were considered in granting qualified immunity). Another post-incident case permits officers summoned to a scene by a call for backup to rely on the backup call to justify their actions at the scene. *Flowers v Fiore*, 359 F.3d 24, 34 (1st Cir. 2004). Of course, the relative dearth of emergency-backup-call cases ought to militate in Officer Foubert's favor. The paucity of cases shows that no clearly established law put Officer Foubert on notice that he could not properly infer a risk of harm justifying force in the present case.

direction. Breen tried to flag the car to stop, but it would not. Fearing for his safety, he fired two shots. The second shot killed Cooper.

The Second Circuit found that certain factual disputes precluded a finding that Officer Breen had not used excessive force, and it also denied qualified immunity, based or its finding that the law was somehow clearly established. Much as in the case presented here, the Second Circuit foreshortened its consideration of qualified immunity by referring back to the very issue that required trial to determine excessive force—the issue whether the officer reasonably believed that the driver posed a significant threat of death or serious physical harm to the officer or others at the time the officer fired his gun. Just as in the present case, the Second Circuit conducted no search for case law that would show that an officer ought not to fear harm after experiencing an entire sequence of events similar to those that Officer Breen had undergone. Instead, the court contented itself with simply reiterating the need for jury trial on whether Officer Breen had used excessive force.

Thus, *Cowan* commits the same error as the Sixth Circuit majority here. That is, an overly segmented analysis of the facts led to an inadequate determination of whether clearly established law put the officer on notice that he was violating the Constitution. Indeed, segmenting in this manner led to the court's failure to identify the most relevant cases (or lack thereof), *i.e.*, cases in which an officer inferred a risk of harm from an entire sequence of events leading up the the use of force. The Court should grant certiorari and clarify that, when determining whether clearly established law put an officer on notice that his use of force would be excessive, courts should look for cases that address all important aspects of the totality of circumstances that faced the officer—especially the officer's experiencing the sequence of events leading up to the use of force.

B. The Sixth Circuit's error here reflects the lower courts' confusion in construing and applying *Hope v. Pelzer*, 536 U.S. 730 (2002). *Hope* is inapposite in excessive force cases like the present one, because of (1) the emergency circumstances in which the force is used and (2) the existence of undisputed facts supporting an inference that Foubert's fellow officer was at risk of being harmed.

As explained above, under *Saucier*, an officer is stripped of immunity only if the constitutional right that was violated was "clearly established," *Saucier*, 533 U.S. at 201, a standard that is met when there are cases presenting "facts not distinguishable in a fair way" from the present case. 533 U.S. at 202. The trouble, in this case and for the courts of appeals generally, has been understanding the meaning of "facts not distinguishable in a fair way." In other words, how factually similar must a prior case be in order to constitute "clearly established" law that puts the officer on notice that he could be held liable?

Part of the confusion below stems from the developing jurisprudence that recognizes that the "fair warning" standard does not "point[ ] to a single level of specificity in every instance." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002), citing *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). It appears that *Hope* is exercising a tidal influence on cases like the present one, inducing courts in some instances to relax the degree of particularity they require in reviewing prior excessive-force cases. *See Haugen v. Brosseau*, 351 F.3d 372, 391 (9th Cir. 2003), cert. petition

pending, *Brosseau v. Haugen*, Case No. 03-1261;[3] *Cowan*, 352 F.3d at 761. That is wrong, because *Hope* and *Lanier* should not aaply to cases such as this one.

In *Lanier*, the Court faced the issue whether prior cases provided fair warning to a criminal defendant that his conduct could lead to criminal liability for violating the Constitution. The Court held that a "fair warning" standard that parallels the "clearly established law" test should apply in such criminal cases. To be sure, in the civil context as well, courts must sometimes decide whether a cause of action exists in a general sense, and that general determination will constitute an initial step in the qualified immunity analysis. In *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court explained how an action could not violate a "clearly established" standard when the action is not even a "violation" of the law at all:

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of any constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.

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[3] Like the first question presented in this case, *Brosseau*'s second question challenges the Ninth Circuit's misapplication of the clearly established law standard in that case. If the Court grants certiorari as to the second question in *Brousseau* (No. 03-1261), then it should also grant certiorari here, or at a minimum, it should hold the petition in this case pending decision in *Brosseau*.

Id. at 232.

But by stark contrast with the situation in cases like *Lanier* and *Siegert*, cases such as *Tennessee v. Garner* and *Graham v. Connor* establish that the exercise of force in connection with an arrest can give rise, in a general sense, to a civil rights action based on alleged Fourth Amendment violations. Accordingly, the inquiry into whether an officer used excessive force in a case like the present focuses not on the general existence of a cause of action, as was the issue in *Lanier*, but rather the *presence of particular circumstances that create a legitimate issue of civil liability for decision by a judge or jury.* It follows that, in proceeding to *Saucier*'s next step and determining whether there was clearly established law, a court should look not simply for case law that states a general principle that would establish the existence of a cause of action overall. Instead, courts must seek cases of sufficiently similar particulars such that the officer would be "on notice" of a potential violation—on these particular facts—to begin with.

Nor should *Hope* itself be read to dictate a contrary result. In *Hope*, the Court clarified the degree of factual similarity that constitutes the law as "clearly established." In particular, the Court rejected the Eleventh Circuit's standard, which had required that previous cases must be "materially similar" to the case at bar in order to constitute the law as "clearly established." 536 U.S. at 739. But *Hope* unquestionably addressed qualified immunity in a context very different from the garden-variety, excessive force claim presented here. In particular, two closely related points of distinction show *Hope* to be completely inapposite.

First, *Hope* addressed a situation in which individual prison officials defended against an Eighth Amendment claim by invoking a "policy or practice of cuffing an inmate to a hitching post or similar stationary object for a period of

time that surpasses that necessary to quell a threat or restore order." 536 U.S. at 736. Whether prison officials should enjoy qualified immunity for applying a standard prison policy of using the hitching post, without regard to any particular need to do so, is simply a different issue from applying immunity in most arrest cases. In the arrest context, "police officers are often forced to make split second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Saucier*, 533 U.S. at 205, citing *Graham*, 490 U.S. at 397. When officers respond to the developing exigencies of an arrest situation, courts should shred immunity based only upon "careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396. In emergency-response cases, the critical fact is the emergency itself, so courts ought to look for *emergency* cases that the courts have already decided.

The second point of distinction lies in *Hope*'s reliance on the Court's finding that, on the specific facts of that case, "[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post" and that the case involved "a clear lack of an emergency situation," 536 U.S. at 738. To be sure, officers in excessive force cases sometimes use force in contexts in which no harm exists, and in such cases no particular case law is necessary to show the law was "clearly established." *See Vinyard v. Wilson*, 311 F.3d 1340, 1350-51, 1355 (11th Cir. 2002) (applying "obvious clarity" standard derived in part from *Hope* in context where no facts at all pointed to any risk of harm at the time force was applied). Courts in such cases may well be justified in finding that more general principles apply with "obvious clarity."

That doctrine, however, surely does not extend to the present case, in which undisputed facts show that Officer Foubert received an emergency call for assistance and

inferred a risk of harm, so that he necessarily decided his approach from that moment forward in that emergency-response context. Where, as in this case, some undisputed facts support an officer's inference of a risk of harm, he should enjoy qualified immunity unless prior cases have rejected such an inference *on specific facts that cannot be fairly distinguished.*

In spite of the distinction between *Hope* and most excessive force cases, the broad sweep of *Hope*'s language has spawned confusion among the lower courts of appeal. *See Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of Hope v. Pelzer on the Qualified Immunity Doctrine*, 38 Ga. L. Rev. 661, 690 (2004) (noting that "[a]fter *Hope v. Pelzer*, the Eleventh Circuit, as well as all other circuits, has been grappling with its standards of qualified immunity"). On one hand, most commentators and courts have treated *Hope* as a decision aimed solely at correcting a grievous error on those particular and egregious facts. *See Excerpts from the Practicing Law Institute's 18th Annual Section 1983 Civil Rights Litigation Program*, 19 Touro L. Rev. 625, 653 (2003) (Professor Blum noting that Hope provides "nothing new" and served only as a "distinct message to the Eleventh Circuit"). Accordingly, courts in some cases have largely ignored *Hope* in conducting their qualified immunity analyses. *See, e.g., Willingham v. Loughnan*, 321 F.3d 1299, 1300 (11th Cir. 2003) (finding that *Hope*, even though reversing the Eleventh Circuit itself, did not change the pre-existing law in that circuit, and that *Hope* is limited only to cases factually "like *Hope*").

On the other hand, some courts either mention *Hope* in connection with applying a relaxed standard of particularity, as did the Ninth Circuit did in *Haugen* [351 F.3d at 391] and the Second Circuit in *Cowan* [352 F.3d at 761], or else—without mentioning *Hope* by name—treat

qualified immunity after *Hope* as allowing a more relaxed standard, as the Sixth Circuit did in this case and as the Third Circuit appears to do in the tight-handcuff case *Kopec v. Tate*, 361 F.3d 772, 777-78 (3rd Cir. 2004).

As the petition aptly articulates the point, *Hope* appears to be encouraging a "*carte blanche* mode of analysis" under the second prong of *Saucier*. *See* Pet. at 15. For instance, the court here found that a case involving placing handcuffs too tightly on a suspect was so factually similar to tackling a suspect as to place Officer Foubert on notice that his tackle violated a clearly established constitutional right. *See* Pet App. 27a (holding that "[i]f overly tight handcuffs can constitute excessive force under certain circumstances, it is readily apparent to me that the more physically intrusive, combative, aggressive, and potentially harmful act of tackling can alone constitute excessive force in certain circumstances"). For an officer to extrapolate a prohibition against tackling from a prohibition against placing handcuffs too tightly on a suspect is asking too much. Officer Foubert was not given fair warning of the constitutionality of his conduct in this case.

While a proper understanding of *Saucier* and *Hope* allows both cases to peacefully co-exist, the lower courts have struggled to find that balance. Indeed, the subtleties of *Saucier* and *Hope* are such that at least one commentator has suggested that *Hope* and *Saucier* are at complete odds with one another. *See* Balch, *Is There Hope After Hope? Qualified Immunity In The Eleventh Circuit*, 54 Mercer L. Rev. 1305, 1312 (2003) (posing the question "[s]o what is a court of appeals to do in the face of seemingly conflicting decisions?"). If legal commentators are confused, the cases can surely not be regarded as providing clear instruction to police officers. For this reason, this Court should grant review in order to better harmonize *Hope* and *Saucier*. *Cf.*

Vinyard v. Wilson, 311 F.3d 1340, 1350-53 (11th Cir. 2002) (adopting a three-part model to harmonize *Saucier* and *Hope*).

Finally, the *carte blanche* approach to the "clearly established" test exacerbates the outcome brought about by the overly restrictive view of "totality of the circumstances" discussed above. Some courts, like the Sixth Circuit in this case and the Second Circuit in *Cowan*, are piercing immunity even when no prior case contains sufficiently similar facts to put the officer on notice that his conduct violates a constitutional right, and to the extent that they search for prior case law at all, they look only for facts that parallel a tightly segmented portion of the totality of circumstances presented to the officer.

This case marks the confluence of these two types of faulty analysis, and nothing shows the importance of correcting such general, recurrent errors better than observing that (1) the Sixth Circuit here denied Officer Foubert qualified immunity without consulting a single prior case where the use of force occurred because of an emergency call for assistance from a fellow officer, (2) the Second Circuit in *Cowan* denied Officer Breen qualified immunity without consulting any prior cases in which an officer applied deadly force while trying to halt a suspect from driving away under circumstances creating at least some apprehension of harm to the officer, and (3) the Ninth Circuit in *Haugen* denied Officer Brosseau qualified immunity, 351 F.3d at 391-93, without relying on any prior cases in which an officer was found to have used excessive force by firing a shot in circumstances where the officer might apprehend the danger of high-speed driving by the suspect unless the suspect were stopped. In this last situation, as noted by Judge Tallman and five other circuit judges who dissented from the denial of en banc, "Officer Brosseau's contemporaneous knowledge of

the facts would lead a reasonable officer to believe that Haugen, based on his desperate behavior, was dangerous to others," 351 F.3d at 375.

What the conjoined errors in these cases lead to is nothing less than the collapse of *Saucier*'s second "sequential step"—the "clearly established law" test—back into the first step. That is so because courts such as the Sixth Circuit in this case are doing little more than reiterating, when addressing the issue of clearly established law, the very same reasoning that they had already employed in determining that the force was excessive. Pet. App. 25a ("On the other hand, if Officer Keith and Lyons were only verbally arguing and Officer Foubert tackled Lyons to the ground, Officer Foubert's determination about the amount of force allowable by law under the circumstances would have been mistaken *and unreasonably so*." (emphasis added)). Such decisions do not legitimately apply *Saucier*; they effectively overrule it. *See Saucier*, 533 U.S. at 204 ("The inquiries for qualified immunity and excessive force ***remain distinct***, even after *Graham*." (emphasis added)).

CONCLUSION

For all of the above reasons, the Court should grant Officer Foubert's petition and reverse the Sixth Circuit's denial of qualified immunity.

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